

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VOTER REFERENCE FOUNDATION, et al.,
Plaintiff,

VS.

NO. CV 22-00222 JB/KK

Hector Balderas, Attorney General
for the State of New Mexico, et al.

Defendants.

Transcript of Motion Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on May 17, 2022.

For the Plaintiff: Mr. Eddie Greim; Mr. Matt Miller;
Mr. Carter Harrison

For the Defendant: Ms. Olga Serafimova

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1 THE COURT: All right. Good afternoon
2 everyone. I appreciate everybody making themselves
3 available to me this afternoon.

4 The Court will call Voter Reference
5 Foundation, LLC, et al., versus Hector Balderas,
6 et al., Civil Matter Number 22-CV-0222, JB/KK.

7 If counsel will enter their appearances for
8 the plaintiff.

9 MR. GREIM: Your Honor, Eddie Greim and
10 Matt Miller, Graves Garrett, LLC, for the plaintiffs.

11 THE COURT: All right. Mr. Greim, Mr.
12 Miller, good afternoon to you.

13 And for the defendants.

14 MS. SERAFIMOVA: Good afternoon, Your
15 Honor. Olga Serafimova for the defendants.

16 THE COURT: All right. Ms. Serafimova,
17 good afternoon to you.

18 All right. Let me -- after we got started
19 last week on the subpoena issue, I started putting
20 the opinion together, and I thought what I did in it
21 would help me in drafting, probably, the memorandum
22 opinion and order that you're requesting this
23 afternoon, or that is at issue.

24 Let me tell you my thinking on this, and
25 this will give you something to shoot at this

1 afternoon. When I looked at section -- NMSA Section
2 1-4-5.5(e), it seems to me that the two definitions
3 that are most important there are election campaign
4 purposes, which means -- and let me emphasize this
5 language -- "relating in any way to a campaign and
6 election conducted by a federal, state, or local
7 government." And the governmental purposes means,
8 "noncommercial purposes relating in any way to the
9 structure, operation, or decision making of a
10 federal, state, or local government." That signals
11 to me that the legislature intended those terms to be
12 defined broadly, rather than in a narrow way. And I
13 do think that the noncommercial is an important
14 limitation here.

15 So I think we start with the legislature
16 signaling that, other than commercial uses, these are
17 not -- that they're not intending to be defined
18 narrowly.

19 The provision that I think might, at first
20 glance, be -- consider some limitation is Section
21 1-5-22(a), which the Secretary has incorporated into
22 the new form. At first blush it looks like it almost
23 takes away what the two definitional ones say.

24 "Unlawful disposition of voter file consists of the
25 willful selling, loaning, providing access to, or

1 otherwise surrendering the voter file, duplicates of
2 the file or part of the file by a data processor."

3 So before you get to "data processor," you
4 would think that whoever gets this just can't use it,
5 whether it's a campaign or election. So I think the
6 data processor is very important. And data processor
7 is defined in the voter records section "as a data
8 processing facility and its associated employees and
9 agents contracted to provide data processing services
10 required by the Voter Records System Act."

11 So I think -- y'all can correct me this
12 afternoon, if I'm wrong -- but I think what data
13 processor is is those people that the Secretary of
14 State and the counties and their clerks contract to
15 do the work that state employees would not normally
16 do. And then it makes criminal the use by those
17 people of misusing information that the state and the
18 counties give. So I think that that section is
19 largely irrelevant.

20 So I think that, when you look at the
21 original sections there, 1-4-5.5(e), that the uses
22 that the Lab, and then, of course, Voter Reference
23 are using is relating in any way to election campaign
24 purposes, and relating in any way to governmental
25 purposes. So that the use here that is being sought

1 is lawful under New Mexico State law.

2 I then looked -- and I'm not sure I have
3 written very much on this -- on New Mexico law
4 regarding deference to agencies and their
5 interpretation. And when you look at the law -- and
6 I'll include a section of that in my memorandum
7 opinion -- it appears to me that once you get a legal
8 issue like this, where you're not dealing with some
9 special agency expertise or something of that nature,
10 this is just a pure legal of law -- that really, it's
11 for the courts to decide what the law is.

12 As the Supreme Court in New Mexico said in
13 the Marbobs (phonetic) case, which is 2009, "The
14 Supreme Court in New Mexico affords little, if any,
15 deference to the agency on issues of statutory
16 construction."

17 So I'm inclined -- I think, the first thing
18 I have to do is decide what New Mexico State law
19 is -- to say that I don't think that it bars the
20 activity that Voter Reference is wanting to do here
21 or that Ms. Steinberg is attempting to do, if I
22 understand correctly what they're wanting to do with
23 this data.

24 But then the question becomes: What do we
25 do with that? I'm a federal court, and probably I

1 can't enjoin the Attorney General and the Secretary
2 of State from misconstruing their own law. If that's
3 what they want to do, that's kind of their business.
4 And so I probably can't stop a prosecution. I can
5 give you a piece of paper that says: This is my
6 interpretation of New Mexico law. But I think that
7 they probably can go to their own state courts and
8 attempt to persuade the state courts that I do not
9 have the correct interpretation but that they do.

10 So I think that really the only way the
11 plaintiff is going to get any injunction here is to
12 then persuade me that the -- what the State of New
13 Mexico is doing violates the federal constitution.
14 So you're going to have to convince me that there is
15 a right here that is violated.

16 If I understand the briefing -- and I could
17 be wrong here -- that basically the plaintiffs are
18 asserting two First Amendment rights. The first
19 right that is being asserted is that, of course,
20 they're saying this is their interpretation. But I
21 think I've got to go back -- once I make a
22 determination that their interpretation of state law
23 is incorrect, then I think your argument has to be --
24 I'm pointing to the plaintiffs here -- that they are
25 taking a statute that is -- that allows the conduct

1 that you're trying to do, and selectively saying:
2 You can't do that. And so it's some sort of
3 selective prosecution or attempted prosecution or
4 referral. And so I think that's going to have to be
5 your argument. If I find that I don't agree with all
6 your construction of New Mexico law, but you heard my
7 construction, and so I think that probably it allows
8 the activity.

9 And then I think, then, the second federal
10 right that you're saying is violated is that if you
11 assume their construction to be correct -- that I'm
12 wrong and they're right -- then it prohibits some --
13 it's not content neutral. And I'm having a little
14 trouble with that one. Because if you assume their
15 construction to be correct, it looks to me like it's
16 neutral; they may not be enforcing it against
17 everybody, but at least the plain language is
18 neutral.

19 So those are my thoughts coming in, after
20 working on the opinion for the subpoena. As I began
21 to work on it, I veered into -- I thought I better
22 start taking a look at the law, so the last couple of
23 days I focused on that. Those are my thoughts, if
24 those are helpful to you in shooting at me, and where
25 I am this afternoon as y'all put on your case. Maybe

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1 that will be helpful.

2 All right. Mr. Greim, it's your motion.
3 If you wish to speak in support of it, and if you
4 have witnesses, you can either call your witnesses
5 and -- or you can argue and make an opening
6 statement. I'll let you dictate, since you're the
7 plaintiff in this case, for a little bit.

8 MR. GREIM: Thank you, Your Honor.

9 THE COURT: And I do have -- at the
10 appropriate time I have lots of questions. So I can
11 wait till argument on that. But before I get out of
12 here this afternoon, I want to spend a little time
13 asking both of you some questions.

14 Go ahead, Mr. Greim.

15 MR. GREIM: Sure. Thank you, Your Honor.

16 And I'll just -- maybe we're in the
17 housekeeping area here, but we've conferred
18 extensively in advance of this. And I should note
19 that we have a stipulation of facts and exhibits.

20 THE COURT: Yeah, I saw that. And I
21 have -- it came in kind of in the middle of the day
22 here, so I have not had a chance to look at it. But
23 I did see it.

24 MR. GREIM: So those are in the binder
25 that's been placed up on top of the bench there,

1 along with a copy of the plaintiffs' exhibits, which
2 are actually within the rings. And then we've
3 inserted the Defendant's Exhibits in there as well.
4 In the back are just all of the filings on this
5 motion. So that's a one-stop paper shop.

6 The other thing I wanted to note is that we
7 talked about a sort of division of the day. And,
8 obviously, we'll do what will help the Court decide
9 this the best, but we had talked about having oral
10 argument at the beginning, and then putting on the
11 witnesses afterwards. And candidly, after what
12 you've said here, I think my argument will be shorter
13 than I expected. Although --

14 THE COURT: You can talk me out of the
15 first half.

16 MR. GREIM: Right. Well, we'll see. I
17 think it will be shorter. And we have four witnesses
18 here -- let's see, we have five witnesses total
19 between both sides. And so that may take potentially
20 maybe two hours. But some things we may not cover
21 again based on this kind of helpful beginning.

22 So without further ado, I think I'll just
23 go into maybe a truncated version that focuses --
24 I'll cover the law, but I want to focus on what --

25 THE COURT: Do you want me to ask my

1 questions while you're arguing this?

2 MR. GREIM: Sure.

3 THE COURT: Or is this kind of an opening
4 statement and I should shut up?

5 MR. GREIM: No, I think it can be both,
6 Your Honor.

7 THE COURT: Okay.

8 MR. GREIM: As I go, if I say something
9 that triggers a question or if a question is
10 triggered anyway then go ahead, and I'll just deal
11 with it.

12 THE COURT: Well, let's talk a little bit
13 about the facts so that I make sure that I understand
14 the facts here. And the State may want to comment on
15 these as well to make sure, because, you know, I may
16 be wrong on the law, but I want to be a good trial
17 judge and try to get the facts right.

18 Can you explain the kind of errors -- you
19 talk about errors that Voter Reference wants
20 VoteRef.com users to find in the voter data to
21 ensure -- I think your words are "election
22 transparency and integrity." I think you talk about
23 that in paragraphs 33 to 34 of your complaint, page
24 10. What errors do you have in mind?

25 MR. GREIM: Your Honor, I can answer that

1 immediately, but I will also tell you we've got a
2 witness who can talk about that. So you may want to
3 hear it from me or you may want to hear it from the
4 witness.

5 THE COURT: Give me a short version of it
6 here.

7 MR. GREIM: Sure. So there are some just
8 basic errors with dates of birth, address, people are
9 listed as being on the voter rolls who shouldn't be
10 on, they've passed away. They're the very things
11 that you and I, not being people who deal with voter
12 rolls every day would think about. So there are
13 those issues.

14 But a separate question is this something
15 that you'll hear about called the discrepancy. And
16 the discrepancy is sort of, if you take everyone who
17 has voted -- not necessarily voted, counted for a
18 candidate -- but everybody who has gone and cast a
19 ballot on election day. You take that number, and
20 then you compare it with the voter rolls, and the
21 voter rolls ought to contain a designation for each
22 person who did vote. It will say they voted in this
23 last election. And so you want to match those two
24 numbers up. You want those two numbers to be the
25 same. Now, when there is hundreds of thousands of

1 people, you know, they often are not the same.

2 And so what Voter Reference Foundation
3 wants to be able to do is it wants Secretaries of
4 State and chief election officers to make public the
5 reconciliation of those two numbers. Because you
6 find other errors that way. You might find that the
7 Secretary of State's Office has accidentally just
8 deleted voter records. Even when someone passes
9 away, you don't necessarily delete the record, or
10 someone moves, you don't delete the record. You can
11 still look and say: Well, they were on the list,
12 they voted, but we've taken them off. They're not an
13 active voter anymore.

14 So it's that entire process of explaining
15 the discrepancy and kind of showing your work, like
16 they tell you in calculus: The answer is in the back
17 of the book, show us how you got to that number. So
18 that's what Voter Reference Foundation wants to do.

19 THE COURT: Well, are the plaintiffs asking
20 only for the data from election day?

21 MR. GREIM: No, no, they're asking -- they
22 ask for -- there are different asks that you can make
23 of the voter rolls. And so the very first set of
24 data they got was from the April of 2021. So it was
25 after election day, it was five months afterwards.

1 They've made subsequent requests. And what you'll
2 hear is that the Secretary of State has stopped
3 answering requests from Voter Reference Foundation.

4 So, yes, you do want to get what was there
5 on election day. If they don't have that data
6 anymore, you want to try to reconstruct the process
7 of moving people off the rolls if that's indeed what
8 happened.

9 THE COURT: All right. Let me talk to you
10 then about the process. You've explained to me the
11 errors. Can you explain the process by which these
12 users will find, and then I think your word is
13 "rectify" these data errors?

14 MR. GREIM: Sure. Yes, they'll rectify --
15 I think that's the right word for the errors. So a
16 voter can get -- on you get to the website, and the
17 very first thing you see when you choose a state is
18 there will be a pop-up saying, you know, this is
19 going to be used for an election-related purpose, so
20 click if you agree to terms. And if you click, it
21 let's you in. And there are little fields you can
22 fill out. You can put someone's name in. You can
23 put someone's address in. There is even a way to
24 say: Okay, I want to see the lines for everybody in
25 a certain precinct. So you can do that, run that

1 query in the database, and it will show the names.

2 So the first thing you might do is check
3 your own record, make sure your own information is
4 correct. Then you might check your spouse and your
5 family members. You know, you've got an aunt who
6 lives by herself or somebody who is in assisted care,
7 you might check and see what their records show. The
8 entire point of this is for voters to sort of take
9 control of their own records and sort of become
10 responsible for accuracy of their own records. And
11 they can contact the county clerk and say: There is
12 a mistake. That's a much faster and more
13 citizen-engaged way of making sure the voter records
14 are accurate, than just hoping that they
15 cross-reference databases at the state level every
16 couple of months.

17 THE COURT: So I have a question, but if
18 you don't want to answer a whole bunch of questions
19 that are related to this, this is fine. But I guess
20 the one that comes to mind: What are these users
21 comparing the voter registration data to? What is
22 the comparison point?

23 MR. GREIM: Sure. When it's just regular
24 voters, it's their own knowledge. I mean, if it's
25 their own record, they know where they've lived, they

1 know what their birthday is. If it's a relative,
2 they know the same thing.

3 Sometimes, though, if they're doing a
4 precinct pull, they'll see data that they know is
5 wrong. And so one thing you'll hear about -- and
6 I'm afraid I'm getting so far into the details, I'm
7 just giving the witnesses' testimony here. But you
8 can look and see certain codes that are put in when
9 they can't read someone's birthday, like 01/00 or
10 something like that, or 1901, some placeholder that's
11 typed in. And you know, when you put all the data
12 together and see all those, it's obvious what they're
13 doing. But then around an election someone sees
14 that, they say: Well, a 110-year-old person voted.
15 So there are certain things you can find on your own
16 with your own background knowledge. You don't have
17 to be some kind of a specialist.

18 Now, other people can use the data for
19 that, and Voter Reference Foundation, as you'll
20 learn, has former election administrators who
21 understand this. They've worked in many states.
22 They've hired people from many states who work with
23 Secretaries of State. And they can do other work
24 that I don't frankly understand.

25 THE COURT: Well, can you walk us through

1 how Voter Reference wants to crowd source its
2 supporters to access, use the data?

3 MR. GREIM: Sure, I can. And again, Your
4 Honor, I'll tell you these witnesses here can do it,
5 but I'll give you a very short version.

6 You know, crowd sourcing is basically
7 everybody out there -- you know, it's like Wikipedia
8 in a way. Everybody out there who has information
9 about this, go in, and if you see a mistake, contact
10 the administrator. So that's crowd sourcing. You
11 might even talk to your own neighbors, talk to your
12 own family members. Aunt Lois, didn't she move to
13 Tucson last year? Yeah, she did. Well, doing your
14 own work is what crowd sourcing is, and then
15 reporting that to the Secretary of State.

16 THE COURT: I'm circling back to the
17 election day question. If Voter Ref is concerned
18 with voter fraud, then doesn't it need to access
19 voter rolls as they stand on election day?

20 MR. GREIM: Well, it's not necessarily
21 about -- I shouldn't even say "necessarily." It's
22 not really about voter fraud, it's really not about
23 voter fraud. It's really about transparency of the
24 election rolls. I mean, if no voter fraud is found,
25 Your Honor, then wonderful. Then we've also done our

1 job here.

2 But I agree with you that for one
3 particular thing that matters, which is this
4 reconciliation of everybody who cast a ballot versus
5 everybody who the voter rolls shows as having voted,
6 that is the most important data set is the election
7 data.

8 But that's only one of the things people
9 do. And that's actually done by VRF staff.
10 Individual citizens aren't looking at the whole data
11 set. They don't have those other numbers for the
12 Secretary of State. Voter Reference gets those from
13 open records requests. And tried to do so in New
14 Mexico, but was ignored.

15 THE COURT: All right. Let me ask one more
16 question on process and I'll move along. How does
17 accessing a snapshot in time of voter rolls serve
18 Voter Ref's purpose in ensuring election integrity
19 and transparency?

20 MR. GREIM: Well, I mean, you do want a
21 snapshot in time on election day. So that would be
22 the gold standard, if they still have that data. If
23 you get a snapshot in time for a later period, then
24 you've got to work backwards and say: Okay, who has
25 been added and who has been removed? You know, are

1 we under three or four thousand votes because people
2 have just moved counties or something, and they
3 haven't come back on? Or do you not actually keep a
4 paper trail?

5 And, Your Honor, that may be what we learn,
6 if New Mexico ever starts responding to the open
7 records request again. We may learn that New Mexico
8 doesn't, you know -- theoretically, we can guess why
9 the numbers are different, but there is no paper
10 trail to get us back to zero.

11 So the answer at the end of the day may be:
12 Please start keeping a paper trail, and make it
13 publicly available to everybody in New Mexico.
14 Basically, our point, Your Honor, is more disclosure
15 is better. If we've got a problem with transparency
16 and a problem with trust, one solution says: Limit
17 the data that voters can see, because they're just
18 going to jump to conclusions. They're just going to
19 attack elected officials and they're going to get
20 each other stirred up. And we can't have that. So
21 they need to just trust their elected officials and
22 trust that they're good.

23 The other approach is we need more
24 transparency. Let people get on. Let Voter
25 Reference Foundation have this data that should be

1 publicly available, and let them even work, as they
2 have with other states, like Colorado, and figure out
3 what the discrepancies are. So it's a difference of
4 philosophy that ultimately is the parties' dispute
5 here, I think.

6 THE COURT: All right. Let me ask you some
7 mechanical questions. Why didn't Voter Reference
8 Foundation apply for this data?

9 MR. GREIM: You'll learn more about this.
10 But this entity, Local Labs, is a specialist in
11 getting public records. It does this all over the
12 country. And so in the early stages of this process,
13 so now we're talking early 2021, it seemed better,
14 rather than staffing up Voter Reference Foundation
15 with lots of workers who would do this, to simply go
16 to Local Labs and have them do that. And Voter
17 Reference Foundation on its website makes it clear.
18 They have what they call a "chain of custody
19 document," so anybody who clicks on New Mexico can
20 see, okay, these are the emails from Local Labs with
21 this stuff, Lauren Hutchinson in New Mexico
22 requesting the data. And that's the data that we
23 have on the website.

24 So it did that for a while. Now, it's
25 moving to doing this in-house more. You'll learn

1 more about that from the witness.

2 THE COURT: And why did you go through this
3 particular company, Local Labs?

4 MR. GREIM: I don't know exactly why Local
5 Labs, among many others, other than they're good at
6 this. They're the ones that, if you do this often
7 enough, you learn a little bit about asking for
8 public records, you learn a little bit about the laws
9 that apply, you know, the forms that are used. But I
10 can't really answer today why Local Labs as compared
11 to others.

12 THE COURT: All right. You've got this
13 data you put on your website. Can users of
14 VoteRef.com download the data?

15 MR. GREIM: I think the answer is no. But
16 that may be a question for one of the witnesses.

17 THE COURT: How does VoteRef.com ensure --
18 I saw your contract that people have to agree to, but
19 how do they ensure that the data is not used to
20 harass or intimidate voters?

21 MR. GREIM: Well, ultimately, once somebody
22 has the data, you can't actually physically stop them
23 from doing it. We simply make them aware of the law,
24 and make them agree, by clicking that they agree, and
25 that's what gives them access. But we don't have any

1 other way of going out and following people or
2 tracing backwards from instances of harassment. I
3 will say I don't think we're aware of anyone using
4 the data for some other nonelection-related purpose.

5 THE COURT: How does VoteRef.com ensure
6 that members of the public will not use the data for
7 commercial purposes?

8 MR. GREIM: It's the same thing. It's the
9 same disclosure.

10 THE COURT: So you really don't have
11 anything other than just their word for it?

12 MR. GREIM: That's right. I mean, in the
13 same way the Secretary of State just has the
14 affidavit from the requester.

15 THE COURT: In your complaint you state
16 that -- and I'm quoting here, but I didn't write down
17 where I got this -- "VRF is a nonpartisan, nonprofit
18 subsidiary of Restoration Action, Inc., a 501(c)(4)
19 social welfare organization." Is there a
20 relationship between Restoration Action, Inc. and
21 Restoration PAC?

22 MR. GREIM: I think that they are under
23 common control. I think that's true. And I think
24 that's a common -- you know, commonly a 501(c)(3), a
25 501(c)(4) and a PAC will share a similar name, or the

1 same name. And they each do the activities that are
2 appropriate under their tax-exempt status.

3 THE COURT: So the answer is yes. And what
4 is that relationship? What are they doing together?

5 MR. GREIM: Your Honor, I don't really know
6 what Restoration (c)(4) is doing with Restoration
7 PAC. But I can say a PAC has to be doing
8 candidate-related activities. And I can say that VRF
9 is not engaged in candidate-related activities.

10 THE COURT: All right. You can tell that,
11 from you, I'm really interested in what your
12 arguments are about the First Amendment violation.
13 What is your strongest Supreme Court and/or Tenth
14 Circuit case that supports a First Amendment right to
15 public access to this data? Assuming that the State
16 is correct, they don't have to give it to you, what's
17 your strongest case that there is a First Amendment
18 right to public access to the voter data if they're
19 not willing to give it to you?

20 MR. GREIM: Your Honor, that's actually a
21 distinct question to us. And I do have a case on
22 that, although the First Amendment theory is
23 different. It's different than what we briefed,
24 based on the documents we received. So I guess I'll
25 answer that. But I want to emphasize that it only

1 goes -- that the First Amendment theory that I'm
2 going to mention here -- only goes to the denial of
3 access. What we're talking about in our case -- what
4 we were talking about until we learned what was going
5 on just recently, was really the prosecution and the
6 threats for sharing the data, for using the data.

7 And I do have -- and I can go through the
8 theories there. It's really a disclosure theory, not
9 a claim that we have a First Amendment right to get
10 the data.

11 But to go to your question, I think that
12 the best argument that goes to the failure to share
13 data is not that there is a First Amendment right to
14 get the data. Rather, there is a First Amendment
15 right not to be blocked from getting the data,
16 because an official disagrees with our political
17 speech. So that would sound in retaliation, First
18 Amendment retaliation.

19 And the Supreme Court case there -- and I
20 freely acknowledge I'm going outside -- this is not
21 briefed; I'm sure this is not briefed -- would be the
22 Evans versus Bartlett, 139 Supreme Court 1715, from
23 2019.

24 So the three prongs of that -- this was at
25 the end of my presentation, but I'm going to go right

1 to this -- was constitutional protected conduct,
2 which there is. The other side concedes, I think,
3 that by sharing the data, we're engaging in speech.
4 By blocking us from doing that, it's a direct
5 regulation of speech.

6 The second point, "Is retaliatory action
7 sufficient to deter a person of ordinary firmness
8 from exercising its constitutional rights."

9 The third is basically a causal link
10 between those two. So, in other words, if the
11 government, in retaliating against someone for
12 exercising their rights -- well, that they did
13 retaliate against someone for exercising their
14 rights. And so in this case that's the fact pattern
15 we actually have in the failure to share the data.

16 So the First Amendment issue is not really
17 the sharing of the data. It's really our going on
18 and speaking, sharing the data with other people.
19 The retaliation is blocking us from being able to get
20 it in the first place. Emails go unanswered. They
21 just ignore VRF, on the theory that VRF is a
22 malicious actor.

23 So that's the retaliation claim. And again
24 that wasn't the main theory we had here. Because we
25 didn't realize that was the case until we saw some

1 records that were produced. And you'll see those in
2 the exhibits.

3 THE COURT: All right. Whatever you call
4 that right, how do you balance that right with an
5 individual's informational privacy rights? I think
6 that's the way it's kind of called.

7 MR. GREIM: Sure. Well, I think, you know,
8 on the one hand -- and we haven't briefed the
9 National Voter Registration Act. We haven't briefed
10 HAVA (phonetic). We haven't gotten into those
11 things. But at some level, the legislature,
12 Congress, and then even New Mexico, as we look at the
13 correct reading of these statutes have made that
14 balance. They have declared the public policy that
15 these records are to be made public. Now, exactly
16 how and exactly to whom are legislative questions.

17 But that's the first answer, is that there
18 has sort of been a legislative choice that the right
19 privacy in your official act of voting -- this is not
20 your vote; it's just the fact that you did cast a
21 vote -- that that's an official act, and that any
22 rights you have in privacy about whether you voted or
23 not, or where your address is, are outweighed by the
24 very strong interest that we have in sort of knowing
25 about our elections and letting citizens themselves,

1 and not just a couple of elected officials sort of
2 police the elections. So the balancing of those two
3 things really comes out in favor of those who want to
4 know the information, want to talk about the
5 information.

6 Remember, too, Your Honor, that we're not
7 talking about Social Security numbers here or the
8 types of data you have to redact from court
9 documents. We're talking about, you know, an
10 address. We're talking -- even when we get the last
11 four digits of a Social every now and then, we
12 actually don't release that. So I think that there
13 are privacy interests at stake that balance way
14 strongly, though, in favor of disclosure.

15 THE COURT: What makes this voter data
16 different than other personal data that the
17 government collects, but is not otherwise made
18 public, such as motor vehicle records?

19 MR. GREIM: Sure. The core of our
20 democracy, or our republic -- it's both -- the core
21 of that is the electoral process. And it's so
22 important that we've got an entire superstructure
23 that divides up responsibilities between the states
24 and the federal government, and within the state
25 between the counties and the state level. But the

1 key to the entire process is democratic
2 accountability. And from the U.S. Constitution on
3 down, the clear pattern we see is that we want the
4 properly elected officials, the legislatures setting
5 the rules. And further, that we want voters to be
6 able to understand what's happening with the process.
7 Because if there is a mistake with motor vehicle
8 records, it's not a good thing, but it doesn't go to
9 the very core of our democracy. It's not the kind of
10 thing that goes to people's belief that we can
11 actually govern ourselves. Voting is. When you go
12 and vote, you are committing maybe the most solemn
13 act that you can as a citizen. Maybe that or serving
14 on a jury. So it's essential like nothing else. I
15 think that's the most important decision, Your Honor.

16 THE COURT: In the motion hearing last
17 week, you suggested that Voter Reference -- and this
18 was in response to one of my questions -- is a hybrid
19 media organization. Can you explain how you
20 understand and define a media organization?

21 MR. GREIM: Sure. Your Honor, I mean,
22 constitutionally speaking, I think when we look at
23 First Amendment rights, I don't think whether you are
24 or are not a media organization matters anymore.

25 But in my own mind, when I was answering

1 your question, I thought somebody who publishes their
2 results of what it is they're doing.

3 And I mean, VRF is not just a research
4 organization. They're not really a membership
5 advocacy organization. They're really someone who
6 doesn't just make the data available. They make
7 available the discrepancy issue. And they press the
8 Secretary of State to then make public how those are
9 resolved.

10 So if VRF had its way, it actually would be
11 the Secretary of State who would be producing more of
12 this information. But because they're not, we have
13 to speak publicly.

14 So, Your Honor, you know, they're a hybrid
15 media organization in that they issue press releases.
16 I don't claim that they've got a bunch of journalists
17 working there. But I also don't think it matters. I
18 think what matters is: What is the political speech
19 that you're engaging in? I think that matters more
20 than if your identity or your classification as a
21 media organization or not.

22 THE COURT: So that definition you give,
23 how does Voter Reference fit that definition?

24 MR. GREIM: Well, they make the information
25 available on their website. And you can click

1 through, they've got a long chain of press releases
2 where they announce their results of this discrepancy
3 review that they do.

4 And so there is probably even a better
5 term. Hybrid media may not be the best term. But
6 the point is, that's what they do. It's core
7 political speech. And that's all that matters for
8 the First Amendment analysis.

9 THE COURT: And these couple of questions
10 I'm going to ask you about media, you're saying
11 they're not relevant to your First Amendment claims
12 in this case?

13 MR. GREIM: Correct.

14 THE COURT: All right. I'll hush. Do you
15 want to say anything else in your opening statement?

16 MR. GREIM: Well, I do, a couple things. I
17 wanted to just kind of step back and look at the
18 framework here. Because I think we've gone through
19 the same thought process that Your Honor went through
20 at the beginning here. You know, what happens when a
21 state official is acting under color of state law,
22 claims to be following state law, but they're
23 actually getting it wrong? Why even go to federal
24 court at that point? Why not go to state court?
25 Isn't that just a pure state law question?

1 But the problem is this: You have to look
2 at the injury that's being suffered by the plaintiff.
3 And you have to look at what they're actually doing,
4 not necessarily the statute that they're citing.

5 And so, you know, a defendant, a state
6 defendant, is not better off because they retreat to
7 a position that then places them in conflict with
8 state law. I mean, that would be kind of a paradox,
9 or maybe a bitter irony, if they could retreat from
10 the earlier position that they took, and now say:
11 Well, we've got this new reading of the law that bans
12 all sharing. And so, if we're wrong, you're going to
13 have to go to state court.

14 If there is a federal constitutional
15 injury, we can be here.

16 And I just want to end with just very
17 quickly saying what that injury is. And by the way,
18 I'm probably over half an hour, and I apologize. We
19 tried to agree to this.

20 THE COURT: This is my fault. I'm going to
21 do this to the Secretary of State here in a minute.
22 But I think we better get to the issues. If we need
23 more time, we can get back together.

24 MR. GREIM: Okay. Well, the main issue we
25 think, Your Honor -- we do think that, at bottom,

1 this is a content-based regulation of VRF. Now, it's
2 true that on the face of the statute, as we now
3 understand the Secretary of State's position, or at
4 least as they've litigated it, they seem to be saying
5 that none of these obvious content-based categories
6 matter. So we understand that.

7 However, if you look at the actual
8 referral -- which we've got here, and it will be in
9 evidence -- and if you look at the actual, or the
10 actually it's been stipulated to; you'll decide
11 whether it's in evidence -- if you look at the
12 statements that were made at the time, it's very
13 obvious that the reason, the actual reason that we
14 were targeted was because of the content of our
15 speech. And if that's true, it's okay, it doesn't
16 matter that the statute itself, as they construe it,
17 is content neutral. The subjective motivation
18 actually is a secondary prong. It's another way to
19 get the content or viewpoint-based discrimination.

20 So the cases there are Reed versus Town of
21 Gilbert; we cited that, I think, kind of a lot in our
22 brief. And then all the way back to Ward versus Rock
23 Against Racism. Now, those two cases turned on, I
24 think, ordinances, actually, that were content based.
25 But the court made clear both times that that's not

1 the only route to a content or viewpoint-based
2 finding. And so, as the facts come in, we'll talk to
3 you more about that.

4 Our secondary position is just what you
5 said: That if the statute is really as they claim it
6 is, well, then, it's grossly overbroad. In fact,
7 forget about what the statute actually says for a
8 second. That becomes relevant on the First Amendment
9 for a different reason I'll get to in a second.

10 But instead, if this is the new rule, take
11 this as an informal rule that they now purport to
12 apply to everyone, if so, then that's our overbreadth
13 argument. Surely, they can keep this from being used
14 for commercial purposes. So that's the plainly
15 legitimate sweep of the sharing restriction. But
16 they ban all other sharing. That's now the position
17 of this office. Whether the statute says it or not,
18 that's the position of the office. So it sweeps in a
19 political party sharing it with a campaign. It
20 sweeps in Catalist, the progressive data collection
21 firm, who is sharing it with their clients.

22 So most of the use that now happens with
23 this data is actually criminal under the Secretary of
24 State's new interpretation. So that's actually an
25 overbreadth problem. And again, it's the same issue

1 as the first argument on content based. We're not
2 tied to the statute where the Secretary of State
3 announces that they're doing a new thing.

4 Where the statute comes into play is on the
5 backed end, when we look at strict scrutiny. The
6 question there is: What is the compelling state
7 interest, and is the restriction narrowly tailored to
8 meet that compelling state interest?

9 And that's when we come back to the
10 statute, and we say, well, the statute tells us what
11 the state interest is. And they're not narrowly
12 tailored. I mean, not only are they not narrowly
13 tailored, they're actually fighting the state
14 interest with their new position.

15 So that's where the two main First
16 Amendment issues come back in. I won't go into a
17 void for vagueness or prior restraint. That's all
18 been briefed. But I really wanted to make that
19 strong point, I think, on where the First Amendment
20 gives us relief in federal court when someone does
21 violate our First Amendment rights.

22 So thank you, Your Honor.

23 THE COURT: All right. Thank you, Mr.
24 Greim.

25 Ms. Serafimova, do you have an opening

1 statement you want to make?

2 MS. SERAFIMOVA: Thank you, Your Honor.

3 THE COURT: Let me start with your state
4 law, since I've kind of been rough on your
5 interpretation of the state law. And I have the
6 statutes in front of me. Walk us through which
7 statutory provisions make Voter Reference's use of
8 the data unlawful?

9 MS. SERAFIMOVA: That would be 1-4-5.6,
10 Your Honor, which is a standalone fourth degree
11 felony, which incorporates by reference 1-5-22 -- not
12 in its entirety -- but the purposes that 22
13 prohibits. It also incorporates by reference 1-5-23,
14 which says that altering voter data is illegal.

15 So 1-5 is -- that is the Voter Records
16 Systems Act. It is a different article than 1-4-5.6,
17 which is the statute that we are under. And so Your
18 Honor is correct those statutes on their own create
19 criminal penalties for people who work for the State,
20 or otherwise have access to voter files by virtue of
21 their employment. So those are separate criminal
22 penalties under Article 5.

23 Then we go under Article 4, and we have two
24 relevant statutes. One is 1-4-5.5, which says every
25 requester has to sign an affidavit promising certain

1 things. And then we have 1-4-5.6, which says, "Every
2 person or entity or corporation which commits
3 unlawful use of voter data" -- that's a defined term
4 -- "is guilty of a fourth degree felony." That's a
5 standalone criminal provision.

6 And the way it defines unlawful use is by
7 incorporating by reference purposes prohibited under
8 Article 5.

9 And so from the beginning, Voter Reference
10 has been misinterpreting the law by having the
11 understanding that because 1-4-5.5 says "purposes"
12 and then 1-4-5.6 also mentions "purposes," the two
13 are related. They're completely unrelated -- well,
14 maybe not completely, but they are unrelated.

15 So under Article 20 of the Election Code,
16 Article 20 creates criminal penalties for every
17 violation of the election code for which a standalone
18 criminal penalty is not provided. And Article 20,
19 specifically 1-20-10, defines false swearing as
20 essentially making a false oath knowing that it is
21 false.

22 So the Election Code has upwards of -- I
23 want to say 16 -- between a dozen and 16 statutes --
24 that mention affidavits, and do not provide a
25 criminal penalty for making a false affidavit. And

1 so those, including 1-4-5.5, are covered under
2 Article 20.

3 And so Local Labs, if we can prove that
4 they made a false statement when they signed the
5 affidavit, they're guilty of a fourth degree felony
6 for making a false swearing under 1-20-10, because
7 that's a penalty for a statute such as 1-4-5.5 that
8 does not provide a standalone criminal liability.

9 Now, Local Labs, by providing the data to
10 VRF, and VRF by providing it to the world on the
11 website violated 1-5-5.6, which again, contains its
12 own independent criminal penalty. And therefore, to
13 interpret it as either being the criminal penalty for
14 5.5 or 5-22, doesn't make sense. Because those
15 sections have their own criminal provisions that
16 apply to them. And also ignores the plain language
17 of 1-4-5.6, which says "purposes prohibited under
18 chapter 5."

19 So, Your Honor, I want to address what you
20 said in the beginning. This case -- the importance
21 of this distinction goes, in my opinion, quite beyond
22 who has the right interpretation of state law.

23 In order to have standing before this
24 federal court, plaintiffs have to show that they're
25 under a credible threat of prosecution. They have

1 not been charged. So for them to have standing, they
2 have to show a credible threat of prosecution.

3 The parties -- so it's not a question of
4 who, which is the state agency that interprets the
5 law, rather it's a question of who can threaten with
6 prosecution. And that's the Attorney General's
7 Office. By statute, for every suspected violation of
8 the Elections Code, the Secretary of State makes a
9 referral to the Attorney General's Office, and the
10 Attorney General's Office is the prosecuting entity.

11 And I have stated that many times on the
12 record, including in pleadings, that it is the
13 Attorney General's position, as a party in this case,
14 that if there is any criminal liability on the table,
15 it is not for violating the so-called use
16 restrictions under 1-4-5.5(c). It is for
17 providing -- otherwise providing access or otherwise
18 surrendering or selling or lending the voter data
19 under 1-4-5.6.

20 And so it goes to standing, which of course
21 is a jurisdictional requirement. It goes way beyond
22 which attorney has the better interpretation of the
23 statute in their opinion.

24 THE COURT: All right. I think I got you
25 to walk through the statutory provisions that make

1 Vote Reference's use of the data unlawful. And I
2 think you may have answered the next question in
3 part. But I want to make sure that I understand it.
4 Can you walk us through which statutory provisions
5 you think make Local Labs' acquisition or sharing of
6 the data unlawful?

7 MS. SERAFIMOVA: So Local Labs signed an
8 affidavit promising to use the data for, first, Local
9 Labs is not a party in this lawsuit. But setting
10 that to the side for a moment, they signed an
11 affidavit promising to use the data only for
12 governmental or, and election campaign purposes.
13 They signed that affidavit with the knowledge that
14 they were going to sell it to a client. They were
15 also put on notice in the affidavit that willful
16 selling of the data is also a violation of New Mexico
17 law. That is on their form. And so they have
18 committed false swearing, and they have also violated
19 1-4-5.6 by knowingly handing over, selling, providing
20 access to -- however we want to describe the
21 conduct -- the transaction between the two parties,
22 of the data to VRF.

23 THE COURT: Do you read Section 1-5-22 as
24 applying to anyone other than a government employee
25 or contractor, a data processor who handles the data?

1 MS. SERAFIMOVA: No, of course not. But
2 1-4 --

3 THE COURT: So that is limited just to
4 government employees and contractors?

5 MS. SERAFIMOVA: On its plain language,
6 absolutely.

7 What we are under is 1-4-5.6, which
8 defines --

9 THE COURT: How do you, though, then, move
10 this language from 1-5-22 to then covering, like
11 using it in the form and the affidavit, and those
12 things, how do you move it over, if you just make
13 that concession?

14 MS. SERAFIMOVA: So, okay, 1-4-5.6 says,
15 "Unlawful use of voter data," which under (b) is a
16 4th degree felony, and under (b) applies to any
17 person or organization, not data processor, not
18 employee of the state. So it says, "Unlawful use of
19 voter data" -- skipping over other uses -- "consists
20 of the knowing and willful use of such information
21 for purposes prohibited by the Voter Records System
22 Act." And that is Article 5. That is where 22
23 resides.

24 And so we may disagree as to whether this
25 was the best way to accomplish what the legislature

1 accomplished, but the plain language says: Look at
2 Chapter 5, see what purposes and uses are prohibited
3 there, that's what we are now making unlawful with
4 respect to the whole world.

5 THE COURT: The New Mexico Secretary of
6 State's website states that, "Servis," S-E-R-V-I-S,
7 "the State Elections Registration and Voting
8 Integrity System Data may be purchased for government
9 and campaign purposes only. This data includes each
10 voter's name, address, telephone number, with voter's
11 consent, year of birth, party affiliation and
12 registration data such as county, precinct, and
13 district information. New system features include
14 real-time updates and voter history." Does a
15 one-time payment include updates to the data?

16 MS. SERAFIMOVA: No, it's a snapshot, as
17 Your Honor said.

18 So this is intended, for example, if Your
19 Honor were a state judge who needed to run to
20 reelection, you could obtain that data. Okay, whose
21 door do I need to knock on? Who do I need to send a
22 mailer to? And perhaps it's different for judges.
23 I'm sorry, maybe that's not the best example. But if
24 you're running for office in the State of New Mexico,
25 you're entitled, under election campaign purposes, to

1 get -- whether it's your district, the residents in
2 your district that you're running for, or if it's
3 statewide for the entire state, you can get that
4 information, and then use it to actually get the
5 petitions that you need, get the signatures, get your
6 name on the ballot.

7 THE COURT: Can you explain how the data is
8 updated and passed along to the requester?

9 MS. SERAFIMOVA: So -- and of course, we do
10 have a witness who is much better versed in those
11 things. But the system uses several sources,
12 essentially, including the Motor Vehicle Department,
13 including Vital Records Statistics Department, to
14 make sure that the information is as up to date as
15 possible.

16 So if I, for example -- if I voted in the
17 November 3 election, but then subsequently, I moved
18 to Colorado, and I registered in Colorado, they will
19 learn, and they'll take me out of the voter rolls.
20 And that's done periodically. And that's just one
21 example.

22 If I die, Vital Records will send them
23 notification, and they will take me off the voter
24 rolls.

25 If I'm convicted of a felony, the same

1 would happen. The Corrections Department will send
2 the information and I'd be taken out of the voter
3 rolls.

4 But again, I do have Ms. Vigil, who is the
5 Elections Director for the State of New Mexico, who
6 will be able to give you a full description of the
7 process.

8 THE COURT: I'm probably going to be
9 looking at that, so I'll go ahead and ask my
10 question. Maybe you'll have some information. How
11 do the election codes of other states who have not
12 released voter data to VoteRef.com differ from New
13 Mexico's election codes?

14 MS. SERAFIMOVA: I don't know the answer to
15 that, Your Honor.

16 THE COURT: Are there any of the election
17 codes that are the same as New Mexico's, that have
18 not released this information?

19 MS. SERAFIMOVA: Well, what I do know is
20 that Pennsylvania asked Voter Ref to take down their
21 information and Voter Ref did that, by claiming that
22 it was unlawful for them to have it up. And I
23 apologize, this case, you know, from my own
24 perspective, has moved quite quickly. So I don't
25 have the answer to that.

1 THE COURT: Do you think that the State
2 could prosecute individual VoteRef.com users who use
3 the data for commercial purposes?

4 MS. SERAFIMOVA: I don't believe we can.
5 And that's the problem. That's why the State
6 interest is so significant, and that's why what's at
7 stake is so significant. Because if we don't have
8 someone who has signed an affidavit, if we don't have
9 the affidavit, we can't limit them to the use
10 restrictions. And that's why your interpretation --
11 which again, we believe is the interpretation that
12 matters, besides being the correct one -- but our
13 interpretation is 1-4-5.6 is crucial to actually
14 making the entire -- well, other provisions of the
15 Elections Code constitutional, because it buttresses
16 the overall interest, which is to basically promote
17 trust in the system.

18 This is information that voters are
19 required to give to us in order to exercise their
20 fundamental right to vote. And so, if they don't
21 trust that we'll keep it as confidential and as
22 secure as possible, then they will not give it to us,
23 they will not participate, and the whole system
24 unravels.

25 THE COURT: The Election Code requires the

1 State to log requests for voter data. Has the State
2 granted or denied access to this data to any
3 organizations that are similar to Voter Reference?

4 MS. SERAFIMOVA: Well, as the witnesses
5 will testify, we -- well, so we do have -- the Deputy
6 Secretary of State will testify today, and the
7 Director of Elections. Neither one of them have
8 heard of Catalist or i360 outside of this proceeding.
9 In fact, I brought it to their attention for the
10 first time when we were preparing for today's
11 hearing.

12 And they will testify that whenever they
13 receive information that indicates unlawful conduct,
14 they have referred it to the Attorney General's
15 Office. They have not received information for
16 anyone other than Voter Ref, and we do have one other
17 referral, which has to do with an audit,
18 quote/unquote audit, in Otero County.

19 But this is unprecedented. As VRF has
20 admitted numerous times, what they're doing is
21 unique. It's happening for the first time. It's
22 unprecedented. So we haven't seen this situation
23 before.

24 THE COURT: All right. Let me move on from
25 state law, and let you comment a little bit on the

1 First Amendment issue. What are the substantial or
2 compelling government interests in withholding voter
3 data from publication online?

4 MS. SERAFIMOVA: Well, the overarching
5 interest is to foster trust in the system, to
6 encourage voters to register, and to vote. The only
7 way for them to vote is to register first. And
8 people would simply not register if they think that
9 we will sell their data or will make it available to
10 the world.

11 One thing I think is important to point
12 out: I, as a voter, I can go to the Secretary of
13 State website, enter my voter ID number, which if I
14 don't have, I can obtain from a different page on the
15 website, and see my own voter history. If I want to
16 share that with Mr. Greim, I can give him that
17 information. I can give him my log-in or I can just
18 share with him. If my aunt wants to give me that
19 information or my neighbor wants to give me that
20 information, they can.

21 What this case is about is people who do
22 not wish to share their voter information, including
23 their voter history or their party affiliation. It
24 is naive for us to pretend that these are not
25 important privacy interests for people.

1 So what Vote Ref could do is, for example,
2 if they want to crowd source information, right, they
3 can have a website that says: Please share with us,
4 log yourself in, tell us, and then we'll see what we
5 can do with that data.

6 They could also get mailing labels from us
7 and then send a letter to every registered voter in
8 New Mexico saying: Please fill out this form. Tell
9 us your voter history. We'll enter it in our
10 database. And then we'll see if we find any
11 discrepancies.

12 What they want to do is publicize
13 everybody's private voter history on the internet for
14 well-meaning relatives, perhaps, but also for
15 everyone else as well.

16 THE COURT: So what harms do you anticipate
17 from VoteRef.com's publication of the data?

18 MS. SERAFIMOVA: Well, for one, we
19 anticipate that people will cancel their
20 registrations to vote.

21 THE COURT: They'll do what?

22 MS. SERAFIMOVA: They'll cancel their
23 voting registrations.

24 So if I don't want Mr. Greim to know
25 whether or not I voted in the last election or where

1 I live or my age or my address -- which I
2 mentioned -- or my party affiliation, what I can do
3 is I can cancel my registration. And then the day --
4 on election day, I can show up at a polling place,
5 submit an affidavit, vote, and then turn around and
6 cancel the very next day. That will create an
7 incredible burden for the Secretary of State's
8 Office. It will increase the likelihood of errors
9 happening ten-fold at least. But it is my only
10 option to keep my information private if, in fact,
11 Voter Ref is allowed to put it on the website.

12 THE COURT: What's the difference in terms
13 of the State's interest that you've identified here
14 between an election campaign accessing and using this
15 data, an election watchdog, such as Voter Reference
16 Foundation?

17 MS. SERAFIMOVA: I'm sorry, could you
18 repeat the question?

19 THE COURT: Yeah. I mean, you've
20 identified the interests, but what's the difference
21 in a campaign accessing and using this data and this
22 watchdog group using the data?

23 MS. SERAFIMOVA: A campaign needs this
24 information. I cannot run for office if I don't know
25 who to go ask for --

1 THE COURT: As far as the information, the
2 campaign accessing and using it in the state interest
3 that you identify, what's the difference?

4 MS. SERAFIMOVA: Well, the campaign cannot
5 put it on the website for everyone to see. What they
6 can do is use it to target -- to go to the
7 neighborhoods where -- for example, if I'm running
8 for a democratic statewide office --

9 THE COURT: And to get your interpretation,
10 they can't put it on a website? I go back to 1.5.22?

11 MS. SERAFIMOVA: No -- well, by way of
12 1-4-5.6. And also by way of the affidavit that they
13 sign.

14 THE COURT: All right. Anything else? I
15 chopped up your opening.

16 MS. SERAFIMOVA: Yes, Your Honor. Well,
17 so, at the hearing on the preliminary injunction in
18 this case, we're learning that VRF is now pursuing a
19 brand-new theory of the case, a brand-new claim,
20 which is First Amendment retaliation. I submit to
21 the Court that that, in and of itself, should suffice
22 for the Court to deny the motion.

23 We cannot -- I mean, this has been,
24 quote/unquote, a trial by ambush in more ways than
25 one. And this is just, perhaps, the most egregious

1 one. We are here to argue very important issues,
2 very important privacy interests at stake. And
3 they're changing their theory of the case the day of.
4 Which, I believe, should signal to the Court that
5 they have very little likelihood of success on the
6 merits, given that they don't even know what theory
7 they're pursuing consistently.

8 And so, another thing I wanted to say is
9 that the Court asked questions about errors in the
10 voter data. It's important to underscore no such
11 errors have been found for New Mexico. I can't speak
12 for any other states. I do know that over a dozen
13 states, at least, have disputed Vote Ref's
14 methodology, if we can call it a methodology. But
15 absolutely no errors have been found for New Mexico
16 as far as we know.

17 Also, the discrepancy that they speak of is
18 not really a discrepancy. The difference in
19 numbers -- because, again, if I vote on November 3,
20 and then I'm convicted of a crime on January 20, by
21 April 13, I will not be on that file. That doesn't
22 mean that I didn't vote on November 3; that doesn't
23 mean that there is a discrepancy. So that's just
24 important.

25 Another thing I wanted to mention is that

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1 there is no new interpretation of state law. Just
2 because, for whatever reason, plaintiffs have
3 misinterpreted the information they've read or the
4 information they received from us, that doesn't mean
5 that there has been an actual change in position from
6 the Secretary of State's Office or the Attorney
7 General's Office. There has not been, and we'll show
8 that, and we have the documents and the witnesses to
9 show that.

10 And Your Honor asked what's the difference
11 between voter data and DMV data. A lot of it is the
12 same. It's my name, it's my address, it's my gender,
13 perhaps my phone number. The distinction is my party
14 affiliation, my voting history. Those are important
15 to me personally as a voter.

16 The interest to Vote Ref in having access
17 to that is much less, especially because I am not
18 willing to give it to them. And our legislature has
19 given me the right to not -- for them to not have
20 access to it.

21 And so, again, I just want to finish with,
22 you know, the number one issue, in our opinion, is
23 the issue of standing. This is not about, again,
24 which attorney has the right interpretation of the
25 law. We, as the prosecuting entity, have said

1 repeatedly in this case that if there is any criminal
2 liability, it is not under 1-4-5.5, and it is not
3 under the use restrictions. It is providing access
4 to or otherwise surrendering the data, or perhaps
5 selling it, or it was put on the website.

6 Thank you.

7 THE COURT: All right. Thank you, Ms.
8 Serafimova.

9 All right. Mr. Greim, do you want to put
10 on your evidence?

11 MR. GREIM: Sure. We'll call Tina Swoboda.

12 THE COURT: Ms. Swoboda, if you'll come up
13 and stand next to the witness box on my right, your
14 left, before you're seated Ms. Rotonda, my courtroom
15 deputy, will swear you in.

16 MS. SERAFIMOVA: Your Honor, we do have Mr.
17 Dylan Lange waiting to be admitted. He's not a
18 witness. He's the Secretary of State's general
19 counsel.

20 THE COURT: Okay. So we'll get him
21 admitted. Why don't you go ahead and admit him
22 first.

23

24

25

1 TINA SWOBODA,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE COURT: All right. Ms. Swoboda. Mr.
6 Greim.

7 BY MR. GREIM:

8 Q. Ms. Swoboda, we'll try to focus on some of
9 the questions that the Court had, and hopefully,
10 you'll do better than I did and give some testimony
11 on those points.

12 Before we jump into that, could you please
13 just give us a little bit about your education?

14 A. Sure. I have a bachelor's degree from
15 Arizona State, and I'm completing my grad degree in
16 political psychology from Arizona State.

17 Q. And what's your current position?

18 A. I'm the Executive Director of Voter
19 Reference Foundation.

20 Q. What are your duties as executive director?

21 A. I manage the operations staff and the data
22 staff, and I talk about the data.

23 Q. Could you just walk us through your past
24 five years or so, your career before you came to VRF?

25 A. Sure. I served under two different

1 administrations in the Arizona Secretary of State's
2 Office. I'm a certified deputy registrar with
3 Maricopa County. And I was the state director of
4 election day operations in the 2020 campaign for
5 President Trump.

6 Q. And what led you to joining VRF?

7 A. I got a recruitment phone call.

8 Q. And when did you join VRF?

9 A. It's a year today, May 17, 2021.

10 Q. Happy anniversary.

11 A. Thank you.

12 Q. So what is VRF? Just, if you could give us
13 a thumbnail sketch.

14 A. It's a foundation dedicated to publishing
15 the voter rolls online for free forever to promote
16 transparency and get the public engaged in
17 understanding how the process works, and to try to do
18 their public oversight duties under the National
19 Voter Registration Act.

20 Q. Why is VRF so interested in public access
21 to voter data?

22 A. We think it's essential. So the National
23 Voter Registration Act public disclosure provision
24 says the public has oversight of voter list
25 maintenance. We do not believe the public has

1 meaningful access to the voter lists right now. In
2 many states they are prohibitively expensive. They
3 are huge files. You would have to be a database
4 analyst to open the giant file. And so we don't
5 think the public has the ability to view the data in
6 a meaningful, clear, simple to understand way.

7 Q. So why are you so focused on the voter
8 rolls themselves?

9 A. They are everything in the election. The
10 election begins with who is eligible; that's the
11 voter roll. And the election ends with who gets vote
12 credit. That's the voter roll. You can't have an
13 election without it. That's the entire basis of the
14 process.

15 Q. Okay. Maybe you can walk us through now
16 what VRF does to fulfill its mission?

17 A. Sure. So we acquire the data. We map it.
18 So different states have different data variables in
19 their data sets. Some states give year of birth,
20 some give the whole birthday, some just give age.
21 Some have party affiliations, some don't. So we map
22 those variables within the data file and the voter
23 history file. In some states there are two separate
24 files. In some states it's all in one. And then we
25 map that up against our fields on our user interface

1 on VoteRef.com. And we publish it. That's on the
2 voter registration side.

3 And I do quarterly FOIAs now. I want to
4 update that every quarter going forward.

5 On the election side of Vote Ref we're
6 comparing the total ballots cast election-wide.
7 That's often called turnout. We don't look at a
8 particular context because there are under votes.
9 You know, people will leave a race blank. We just
10 want to know the total ballots cast as reported by
11 the election officials compared to the total voters
12 in the vote history file, with credit for having
13 voted.

14 And, you know, the numbers don't reconcile.
15 There are reasons for that. Every state is
16 different. I talked to Mississippi, and they said:
17 Hey, pull the canceled voters file, because we pull
18 the vote history out when we archive the voters. So
19 I'm holding Mississippi until I get that additional
20 data. I reach out to the state election official
21 and, hopefully, they work with us so we can
22 understand what we need to get to reconcile the data.
23 Sometimes they don't answer.

24 Q. What does VRF intend the public to do with
25 the data once they log on to the website?

1 A. So on the vote registration side, the hope
2 here is that they will take ownership of their voter
3 registration record, the people in their family, and
4 do their oversight that they are required to do under
5 the National Voter Registration Act.

6 On the election side, I can say my personal
7 hope on that is that there is a public policy
8 discussion about the chief election official being
9 required to reconcile those underlying data files
10 that come from counties and lower level
11 jurisdictions.

12 Q. Let's talk for a moment about the
13 experience that individuals have when they come to
14 the VoteRef.com website. First of all, does VRF tell
15 voters the purposes for which it wants them to use
16 the data?

17 A. Yes. So there is "about us." And there is
18 "terms of service." Then there is a disclaimer. I
19 tend to focus, you know, and promote: Don't do this;
20 you don't want to do this; these are things you can
21 do. And when you land on the landing page, it talks
22 about how we want transparency. And voter
23 registration rolls are public data, and we believe
24 the data belongs to the people, and they should be
25 able to access it in a way they understand.

1 Q. Is the pop-up and the terms and conditions
2 that come up, are those the same across the country,
3 or are they tailored to the states?

4 A. I've got a legal team. And I modify them
5 for every state I put up to ensure I'm in compliance
6 with the terms of service and privacy provisions
7 within each specific state. And we have a disclaimer
8 on every single voter detail page that cites the
9 specific language of the state with regard to
10 protections for people that are secured voters, like
11 stays at home, and that kind of thing, confidential
12 voters.

13 Q. Before we move on, because I don't think we
14 mentioned this concept yet. Could you explain that
15 concept to us, the secure voters or the protected
16 voters. What is that?

17 A. Yes. It's very important. So there are
18 law enforcement officials, victims of domestic
19 violence or stalking. There are many different
20 categories, depending on your state, of voters whose
21 records are protected and redacted. Their addresses
22 must not be shown. When I publish a file, before I
23 publish a file, I notify the chief election official,
24 and I send a link to the file they gave me back to
25 them, and say: It's my understanding you don't have

1 anyone in here under -- and then whatever the statute
2 and the program is. If that's not the case, let us
3 know. And if anyone in this list that you gave me
4 should seek to become protected, please notify me so
5 that I may redact them. And I've got a big glossary
6 for every state. And on each voter show page for
7 every state it tells them how to apply to become a
8 protected voter. And if they email me, I will redact
9 them immediately.

10 Q. By the way, did you do that in New Mexico?
11 In other words, did you send the voter file to the
12 Secretary of State with the caution and the request
13 about any protected voters here?

14 A. I did.

15 Q. And did the Secretary of State get back to
16 you?

17 A. They did not.

18 Q. Did they acknowledge your email?

19 A. No, they did not.

20 Q. Let's talk for a minute -- I did my best
21 with the Court, but I want to ask you now a little
22 bit about the election side of your analysis. You
23 told us before what you're comparing, the two items
24 that you're comparing. And what do you call the gap
25 between those two?

1 A. A discrepancy.

2 Q. And does the discrepancy mean that there is
3 fraud?

4 A. Absolutely not.

5 Q. What does the discrepancy mean to you when
6 you see it?

7 A. I think what it most likely is in cases
8 where the state works with us, it's a recordkeeping
9 issue, in the sense that states do not run elections.
10 There is a chief designated by the Help America Vote
11 Act; there is a chief election official in every
12 state. But counties run elections, lower-level
13 jurisdictions run elections.

14 So when secretaries of state or state board
15 of elections are certifying the data or providing
16 access to the data, they're relying on the uploads
17 they get from the counties in lower level
18 jurisdictions. So if some precinct wasn't uploaded
19 by a county and then that county didn't upload it to
20 the state, the numbers could be off.

21 Like the case of Nevada, they delete the
22 record when someone moves from one county to another.
23 So when they do that, they're deleting the vote
24 history.

25 As I said, in the case of Mississippi, West

1 Virginia realized they had inadvertently, when they
2 archived some voters, taken the vote history with
3 them, which led to the discrepancy. So I think it's
4 process issues.

5 Q. So Ms. Swoboda, what action, if any, do you
6 take when you find a discrepancy?

7 A. I notify the chief election official, and I
8 ask if we could have a call or come meet with them,
9 and learn about their process, so that I can try to
10 identify where the discrepancy is coming from.

11 Q. And some state election officials do that
12 with you; right?

13 A. Yes.

14 Q. And then what's the end result after this
15 meet and confer process?

16 A. We get that number way down. So, you know,
17 if North Carolina is off by 42. In Colorado we got
18 the number down; we reduced it by 11,000. West
19 Virginia less than one half of 1 percent. And the
20 likelihood of why it can't get perfect reconciliation
21 is, again, that some lower level jurisdiction
22 somewhere along the line didn't upload a full file.

23 Q. Why do you bother to do this?

24 A. Because people have to understand how the
25 system works, and they have to have confidence in how

1 the system works. And right now they don't
2 understand. And I think there is a great amount of
3 concern in the public. I think we need to do better
4 oversight. This is a process that's meant to be
5 overseen by the public. And if the public doesn't
6 understand it, they're going to lose confidence, and
7 then they are not going to participate. And I see
8 that a lot. And on a personal level, that frightens
9 me. I want people in the system to have confidence
10 in the system, and they do that when they have
11 transparency.

12 Q. Let me ask you, did you reach out to the
13 New Mexico Secretary of State after you found a
14 discrepancy in New Mexico?

15 A. Yes.

16 Q. Could you please turn to Exhibit P-2 in
17 your binder?

18 A. I don't have P in my binder.

19 Q. You may have plain old numbers.

20 A. I do. Yes, it's my email, yeah.

21 Q. So do you recognize this document?

22 A. I do.

23 Q. What is this?

24 A. It's my notification email to the Secretary
25 of State of New Mexico telling them about the results

1 that I found, asking them to check the voter file to
2 make sure there is no protected voter, and asking if
3 we could have a meeting with the staff or a call with
4 the staff to understand their data.

5 Q. Okay. So did you then have a call with the
6 staff?

7 A. No.

8 Q. I'm sorry, did the New Mexico Secretary of
9 State or anyone in her office respond to you?

10 A. No, they did not.

11 MR. GREIM: Move to admit Exhibit P-2.

12 THE COURT: Any objection?

13 MS. SERAFIMOVA: No objection.

14 THE COURT: All right. P-2 will be
15 admitted.

16 Q. Now, after you sent this email, did you
17 publish the result of your analysis for New Mexico?

18 A. I did.

19 Q. Okay. If you take a look at Exhibit P-1; 1
20 in your binder.

21 A. Got it.

22 Q. Do you recognize this document?

23 A. Yes, that's the press release for New
24 Mexico's publication.

25 Q. And in here you report the discrepancies in

1 many different states; correct?

2 A. Yes.

3 Q. Did you accuse these states of fostering
4 election fraud?

5 A. No, I said the opposite of that.

6 Q. What was the point of publishing these
7 discrepancies?

8 A. To advance the public policy discussion
9 about how we need to reconcile the data. If the data
10 from the bottom up to the top, to the chief elections
11 official, is not reconciled, it provides serious room
12 for doubt. And think we've seen that. And I think
13 we have to get better at the reporting.

14 MR. GREIM: Move to admit Exhibit P-1.

15 THE COURT: Any objection?

16 MS. SERAFIMOVA: No objection.

17 THE COURT: Plaintiffs' Exhibit P-1 will be
18 admitted into evidence.

19 Q. After this release went out, did the
20 Secretary of State contact you and say: Wait a
21 minute, we've got an explanation, let's talk?

22 A. No, they did not.

23 Q. Now, in the press release, I think the
24 strongest language I can find is you say -- this is
25 four paragraphs down -- "The difference between the

1 voter list and the election canvass indicates at the
2 very least issues with recordkeeping, and points to
3 the need to be more transparent and proactive about
4 maintaining the voter rolls and reconciling ballots
5 cast, and voters having voted in every election."

6 Did I read that right?

7 A. Yes.

8 Q. And do you believe that to be the case
9 still today in New Mexico?

10 A. I absolutely do. There is, to my
11 knowledge, no requirement that the chief election
12 official reconcile those two data points. And
13 although the turnout is reported to the Elections
14 Assistance Commission, in the EAVS report every
15 cycle, even that number changes. So unless and until
16 there is such a requirement or the chief election
17 officials voluntarily engage in that reconciliation,
18 the numbers are not going to match.

19 Q. Now, did you make further attempts to find
20 the actual election day number for New Mexico?

21 A. I did.

22 Q. Okay. And what did you do?

23 A. I sent what I call a snapshot FOIA. So
24 voter registration rolls are like a river; they're
25 changing moment to moment. If you want to get an

1 accurate comparison, you need to try to get a
2 snapshot as close to election day as you can. So I
3 sent a FOIA for a copy of the voter registration
4 roll, including history, as close to November 3,
5 2020, as it existed. I also sent a look-back FOIA, I
6 call it, for the list of cancellations so that I
7 could try to reconcile and find all the people who
8 might have been removed because they were adjudicated
9 incompetent or had a felony or passed away or moved
10 out of the state, or what have you. So I sent two
11 separate FOIAs to try to get that data.

12 Q. And did you find that data to be useful?

13 A. I got no response from New Mexico's
14 Secretary of State.

15 Q. So the Secretary of State did not respond
16 to your request?

17 A. They did not.

18 Q. Did they tell you why?

19 A. No. I have never heard anything from them
20 directly.

21 Q. Let's shift gears for a second. I just
22 want to cover a little more quickly than I had
23 intended, just the actual data request that was made
24 here.

25 Now, earlier you testified that you have

1 your own open records team working with you now?

2 A. Yes.

3 Q. In this case, though, did another entity
4 request that data?

5 A. Yes, Local Labs requested that data before
6 I came on.

7 Q. And did it do this in other states for VRF
8 as well?

9 A. Yes.

10 Q. Why use Local Labs?

11 A. It's my understanding they're a company
12 that does public records requests and FOIAs, and they
13 work in that area all the time, so they're more
14 familiar with the forms and who to contact, and have
15 people on the ground.

16 Q. How was Local Labs reimbursed for its
17 services?

18 A. I think they get a flat rate for every
19 state; that includes doing the research on who to get
20 the data from, filing the proper forms, making sure
21 they're in compliance, and then acquiring the data
22 itself.

23 Q. When was the New Mexico data first posted?

24 A. I posted New Mexico, December, I believe,
25 16, 2021.

1 Q. And we've already talked about your
2 analysis of that data. Let me ask about the time
3 that this data was up for -- maybe it was three
4 months. Did the New Mexico site have a pop-up
5 requiring the user to agree to terms of service?

6 A. Yes.

7 Q. And was that tailored from New Mexico law?

8 A. Yes.

9 Q. What do those terms of service require that
10 the user agree to?

11 A. To only use the records for, I believe,
12 election or governmental related purposes, and that
13 they must not be used for any commercial purpose.
14 And then it defines all the various things that might
15 conceivably fall under commercial purposes.

16 Q. Did VRF understand that its own use was
17 allowed under New Mexico law?

18 A. Yes.

19 Q. Did the New Mexico site show this chain of
20 custody information for the data?

21 A. Yes.

22 Q. What did that show?

23 A. A chain of emails between Local Labs and
24 the New Mexico Secretary of State.

25 Q. Did it show the date on which Local Labs

1 requested the data?

2 A. Yes.

3 Q. And any user of the website could click
4 through and see that?

5 A. Yes.

6 Q. Did anyone ever accuse VRF of trying to
7 hide its use of Local Labs or the source of its data?

8 A. I have had no contact or accusation to that
9 effect. I have since read some documentation back
10 and forth in this litigation, that looks like people
11 were talking about it. But no one has ever spoken to
12 us about it.

13 Q. When did you first learn that the Secretary
14 of State had accused VRF of criminal conduct?

15 A. ProPublica published an article about it in
16 March.

17 Q. Did the Secretary ever reach out at any
18 time to say they were making a criminal referral?

19 A. No.

20 Q. Did the office ever reach out to try to
21 ascertain the purpose of the Vote Ref site or ask any
22 questions about the site?

23 A. No.

24 Q. Did the office ever try to contact you to
25 see if it could convince you to remove the materials?

1 A. No.

2 Q. Did it ever contact you to try to find some
3 way to accomplish your goal, while also complying
4 with the Secretary's view of the law?

5 A. No.

6 Q. Did the AG ever do this?

7 A. No.

8 Q. Has there ever been any contact from the
9 AG's office to VRF?

10 A. No.

11 Q. Why did VRF take the New Mexico portion of
12 the database down?

13 A. Because we read in the ProPublica article
14 that the New Mexico Secretary of State thought we
15 were violating the law and had referred the matter to
16 the Attorney General for prosecution. And so we took
17 it down until we could figure out what we had done
18 wrong and how to be in compliance.

19 Q. I just have one other question for you.
20 Are you aware of an entity called Catalist?

21 A. Yeah, I'm aware of several entities and
22 political organizations that acquire voter data in
23 all 50 states.

24 Q. And just to be clear, so is your answer
25 yes?

1 A. Yes, I am aware of that group.

2 Q. It's spelled Catalist, but L-I-S-T on the
3 end; is that right?

4 A. I don't know if it's Y-S-T or I-S-T.

5 Q. So what is your understanding of what
6 Catalist does?

7 A. They acquire voter registration data. And,
8 you know, I believe they've got a particular lean in
9 their partisan view, and they use that data to
10 contact voters to promote policies that they wish to
11 advance.

12 Q. And do they share or sell that data with
13 their own clients?

14 A. I believe they do, yes.

15 MR. GREIM: No further questions.

16 THE COURT: Let me ask you this question,
17 I'm directing this to Voter Reference, and if you
18 want to get more information from the witness on
19 this. It may not apply to her. But does VRF crowd
20 source? Is it finding the discrepancies or is that
21 done just by trained VRF staff, and the public are
22 just verifying individual data?

23 THE WITNESS: It is the latter, sir. My
24 data director is the former voter registration
25 database administrator for the Secretary of State of

1 Arizona, and my assistant data director is the former
2 Cochise County Recorder Voter Registration Director.
3 And they pull the data out of the vote history file,
4 and we take the turnout number, the total ballots
5 cast from the official records submitted to the EAC
6 by the state or posted on their website or on their
7 canvass, when they give it to us. And we do that
8 data, and we just post those exact two data points,
9 and we post the documentation it came from. The
10 public is not given access to that data.

11 THE COURT: All right. Anything else?

12 BY MR. GREIM:

13 Q. Just to follow up. You're talking about
14 the election side?

15 A. Correct.

16 Q. On the voter registration side, is that
17 reviewed for errors, crowd sourced?

18 A. So the idea is that the public is doing
19 their oversight as envisioned in the NVRA, and
20 reviewing their voter registration records on the
21 voter registration side. So there are things like
22 the first name is a comma, and the last name is the
23 letter A, and the registration date and the date of
24 birth are 1/1/1900. So there are a lot of records
25 like that. We don't scrub or clean the data. We're

1 putting it up exactly as it's received, in the hope
2 that the public will do their oversight and report
3 their errors to the county clerk or to the election
4 official, who is the only person in power to correct
5 them.

6 THE COURT: So the public does not have
7 access to the discrepancy data?

8 MR. GREIM: I think that's right, other
9 than through the press release.

10 THE WITNESS: Correct.

11 THE COURT: All right. Anything else, Mr.
12 Greim?

13 MR. GREIM: Nothing else, Your Honor.

14 THE COURT: All right. Ms. Serafimova, if
15 you wish to have cross-examination of Ms. Swoboda.

16 MS. SERAFIMOVA: Thank you, Your Honor.
17 Yes.

18 CROSS-EXAMINATION

19 BY MS. SERAFIMOVA:

20 Q. Good afternoon, Ms. Swoboda.

21 A. Hello.

22 Q. Give me just a second. So you mentioned
23 that you started May of 2021 in your current
24 position; right?

25 A. Correct.

1 Q. So you weren't there for the actual
2 transactions that happened between VRF and Local
3 Labs?

4 A. Correct.

5 Q. But in your declaration -- you remember you
6 submitted a declaration with the pleadings?

7 A. Yes.

8 Q. So in that declaration you state, "I am
9 familiar with VRF's process of obtaining and using
10 voter registration data made available by the New
11 Mexico Secretary of State's Office." Is that a true
12 statement?

13 A. It is.

14 Q. So you are familiar with that transaction?

15 A. I have seen the records of the transaction
16 and the invoices that go out from the foundation,
17 yes.

18 Q. So how much did Voter Ref, or VRF, pay
19 Local Labs for this service?

20 A. I believe it's a flat \$15,000 fee for all
21 services per state for that initial acquisition of
22 the data.

23 Q. Okay. And so in this case that would have
24 been submitting the affidavit, submitting the
25 payment, emailing with Lauren, presumably, right;

1 obtaining the file, and handing it over to you?

2 A. And I mean, it should be researching and
3 doing due diligence about what was lawful with regard
4 to acquiring and transferring the data, and who to go
5 to for the data. Whatever their entire service
6 process is of their services.

7 Q. So it should be, or do you know that that
8 was part of the contract?

9 A. This data was acquired in April. I believe
10 that that is part of the contract. I believe that
11 that is part of the contract. I am sorry, I don't
12 have it in front of me, so that's the best of my
13 recollection.

14 Q. So it may or may not have been part of the
15 contract?

16 A. It may or may not.

17 Q. Okay, great. And also in that affidavit
18 you said that, "Before Local Labs requested voter
19 data from the New Mexico Secretary of State, VRF
20 confirmed that its intended use of the data for
21 election-related purposes was permitted by New Mexico
22 law by reviewing the relevant statutes, including
23 Section 1-4-5.5." Is that a true statement?

24 A. Yes. We have a legal team that looks at
25 every state and tells us whether or not we may

1 legally acquire and publish the data, that's correct.

2 Q. So, presumably, your legal team knew that
3 an affidavit is required; is that right?

4 A. I would presume so, yes.

5 Q. And they reviewed the Election Code?

6 A. I would presume so, yes.

7 Q. Do you know whether or not your predecessor
8 was advised that the data is illegal, or what is
9 your --

10 A. Illegal?

11 Q. So your statement in your affidavit, that
12 VRF confirmed, what is that confirmation? Because
13 you say you presume, but tell me what does that
14 confirmation actually consist of, as far as you know?

15 A. So the Voter Reference Foundation's legal
16 team goes through each state and reviews the
17 statutes, the relevant statutes, to the acquisition
18 and publication of the data, and says yes or no, that
19 this is a state -- like this state is not subject to
20 NVRA. This state doesn't give the data to anyone.
21 This state you have to be a resident. This state you
22 have to be a PAC. So all of these items that are
23 slightly different in each state are reviewed by the
24 legal team.

25 Q. And you have no reason to believe that they

1 did not do that review for New Mexico?

2 A. I do not have any reason to believe that
3 they did not do that review.

4 Q. In fact, you believe that they did do that
5 for New Mexico?

6 A. Yes.

7 Q. So do you know that an affidavit is
8 required under 5.5?

9 A. I do, after reading your pleadings.

10 Q. After reading our pleadings. You did not
11 know that before?

12 A. Yes. I'm the executive director, so I am
13 not the legal team. And I am not the person who
14 acquired the data. So I, myself, personally, do not
15 familiarize myself with every statute for every
16 state, no.

17 Q. You verified the complaint; correct?

18 A. I read the complaint, and I filed my
19 affidavit, correct.

20 Q. And that was on March 28th of this year?

21 A. I would have to look in the book, if you
22 know what page.

23 Q. I believe -- if I represent to you that
24 it's March 28, does that sound --

25 A. Okay. I believe you, m'lady.

1 Q. When did you submit your FOIA requests to
2 the Secretary of State's Office?

3 A. For the snapshot and the look-back?

4 Q. The two FOIA requests that you discussed.

5 A. Yes, the snapshot and look-back. I would
6 have to look. I don't think I have that with me.
7 But it was after the publication and after we took it
8 down. I did it to every state at the same time in
9 waves.

10 Q. So you did not submit an affidavit to the
11 Secretary of State's Office?

12 A. No, I sent -- well, I would have to go
13 look. It might have been a form. I think we sent an
14 email as a FOIA request in an email format.

15 Q. So you did not follow the statutory process
16 that is place in New Mexico to request the data that
17 you are seeking; correct?

18 A. I would have to go look at my operations
19 team that does FOIAs. I have a FOIA team now. So I
20 could look at their records of what they sent. If
21 they sent a form and an email or if they just sent an
22 e-mail. If they sent an email and waited for a
23 response to see if he sent a form back.

24 Q. Do you remember, did you ever sign an
25 affidavit addressed to the New Mexico Secretary of

1 State's Office? Have you ever signed such a
2 document?

3 A. I may have.

4 Q. May have?

5 A. I do not recall. I have 50 states, m'lady,
6 so -- and I'm sending a lot of FOIAs. So my chief
7 FOIA person, operations, comes to me and brings me a
8 form. And I look over it, and if everything on there
9 is accurate and I can attest that I can comply with
10 that, I sign it, and off it goes.

11 Q. Okay. You keep referring to FOIA. Do you
12 know what that is?

13 A. It's a Freedom of Information Act request.
14 In some states it's a public records request. I use
15 it as a general term.

16 Q. And do you understand that this case is not
17 about FOIA?

18 A. I do. Forgive me, I'm using it as a
19 general for public records requests, right to know
20 law, Freedom of Information. The forms filed or the
21 requests made to a state or other government entity
22 to acquire data.

23 Q. So let me just --

24 THE COURT: I need to give my court
25 reporter a little bit of a rest. Why don't we take

1 about a 15-minute break and come back and continue
2 the testimony. All right. We'll be in recess for
3 about 15 minutes.

4 (The Court stood in recess.)

5 THE COURT: All right. Ms. Swoboda, I'll
6 remind you that you're still under oath.

7 Ms. Serafimova, if you wish to continue
8 your cross-examination of Ms. Swoboda, you may do so
9 at this time.

10 MS. SERAFIMOVA: Thank you, Your Honor.

11 (A discussion was held off the record.)

12 BY MS. SERAFIMOVA:

13 Q. Okay. Ms. Swoboda, so we were talking
14 about what you've been referring to as your FOIA
15 request?

16 A. Yes.

17 Q. Do you remember in what month you made
18 those?

19 A. I'm so sorry, I don't. And I don't have my
20 phone, or would I look for you.

21 Q. And do you have this binder that's provided
22 by your counsel?

23 A. Yes.

24 Q. Okay. Can I ask you to go to Plaintiffs'
25 Exhibit 4?

1 A. Email from March 11.

2 Q. And if you go to the second page, there is
3 actually a February 15, 2022 email as well?

4 A. Yes.

5 Q. Is this what you've been referring to?

6 A. Yeah, those are the initials of my former
7 employee on the February 15th. This -- yeah, this is
8 the canceled voters and the total ballots cast. And
9 then on the March 10th, it looks like they're just
10 following up on that one. So there is another one
11 somewhere. But yes, this looks like the look-back on
12 canceled voters request, yes.

13 Q. So can you tell me now whether or not you
14 signed an affidavit, as required under 1-4-5.5?

15 A. It does not appear that for this email
16 request an affidavit was given to me by the staffer,
17 no.

18 Q. Okay. And do you know whether or not this
19 email communication meets the State's requirements
20 for IPRA requests, which is the state statutes?

21 A. I do not. And I would suggest that this is
22 probably why they use Local Labs, because Local Labs
23 did the research and did the proper form; whereas, my
24 team sent an email. So maybe that's not reflecting
25 as well as us taking over for Local Labs. But yes,

1 so I do not know if this meets requirements. This is
2 just language that we drafted for what I was looking
3 for.

4 Q. So would you agree that, if this does not
5 meet the requirement for an IPRA request under state
6 law, then whether or not it was responded to -- well,
7 let me rephrase that.

8 If your email request or your colleague's
9 request does not meet the IPRA requirements under
10 state law, would you agree that not responding to it
11 is not an IPRA violation?

12 MR. GREIM: Objection, calls for a legal
13 conclusion.

14 THE COURT: Well, if she knows. I mean,
15 she works in this field. So if she doesn't know, she
16 can state that. But if she knows, I'll allow it.
17 Overruled.

18 A. I would say with regard to the timelines
19 for the responsiveness of the request. If it didn't
20 meet the requirements, then you would not have been
21 required to respond. And I would also say, having
22 worked in a Secretary of State's Office for two
23 administrations, that we respond to every single
24 email. And when people send requests, which they
25 invariably do, without the public records request

1 form, we reply and say, "Here's the proper form,
2 please complete this form."

3 Q. That's in Arizona?

4 A. That's in Arizona.

5 Q. And what was the staff when you were there,
6 it was the Arizona Secretary of State?

7 A. We had like seven people for the whole
8 state.

9 Q. You had seven people in the Secretary of
10 State's Office?

11 A. In the elections department, yes.

12 Q. I'm asking for the entire office, if you
13 know.

14 A. Well, the entire office includes the
15 library, and the State Records Division, so maybe 250
16 people.

17 Q. And then can you please go to Stipulated
18 Exhibit K?

19 A. That looks tiny. I don't know if I'm going
20 to be able to see it. Does anyone have a magnifying
21 glass? It's like a spreadsheet; right?

22 Q. Yes.

23 A. I can't see that.

24 Q. Let me make --

25 A. I see something in yellow.

1 Q. I'll make a couple of representations to
2 you.

3 A. Thank you.

4 Q. You so the parties have stipulated that
5 this tiny text, Stipulated Exhibit K, includes each
6 and every affidavit submitted to the Secretary of
7 State's Office between January of 2021 and April 29
8 of 2022.

9 A. So your affidavit form for your public
10 records request?

11 Q. Yes.

12 A. Copy that. Okay.

13 Q. And I'll also represent to you that your
14 name, or VRF's name, is not on that list?

15 A. Yeah, I think that you have established
16 that the email sent by my staff asking for records
17 didn't meet your office's requirement, and so you
18 didn't log it or respond to it, correct.

19 Q. Okay. That is correct. So part of your
20 new claim, as I understand it, is that VRF is being
21 treated differently from other similarly situated --
22 well, you are the plaintiffs, right; it is your
23 claim, correct?

24 A. Can you finish the sentence?

25 Q. I would like to. So part of your new

1 claim, as I understand it, is that VRF has been
2 treated differently relative to similarly situated
3 people or entities who have submitted either
4 affidavits or IPRA requests? Is that your
5 understanding?

6 MR. GREIM: Objection, Your Honor. I mean,
7 I just laid out the elements of this claim earlier,
8 as a legal point. I mean, she's asking a fact
9 witness here to --

10 THE COURT: Well, she's the executive
11 director. I think she can testify. If she can't
12 answer it, she can say she can't answer. Overruled.

13 A. I'm sorry. I don't know the answer to that
14 question, sorry.

15 Q. So you are the plaintiff, but you don't
16 know --

17 A. I am the plaintiff, and I think what you're
18 asking me, if there is a new theory in play of the
19 case, and is that just based on the opening
20 statements that we heard? Or is that in a new
21 briefing that maybe I -- I don't know the answer to
22 those questions.

23 Q. It came from your attorney who speaks on
24 your behalf.

25 A. Yes.

1 Q. So you're not aware of this new theory, it
2 sounds like?

3 A. I am of the personal belief that we appear
4 to be being treated differently than Catalist or Data
5 Trust or the Democratic Party or the Republican
6 Party, or any other party. And I base that on some
7 information that was acquired through FOIAs from
8 staff in that office, and the discussions that they
9 had.

10 Q. Now, Catalist, I'll represent to you, is on
11 that tiny list, Exhibit K. So, as someone whose
12 profession, whose current job is to compare data --

13 A. Yes.

14 Q. Do you think it makes a difference, when
15 you're comparing yourself to Catalist, whether or not
16 you actually submitted the required affidavit under
17 1-4-5.5?

18 A. So I would say -- and it's probably not the
19 proper format for me to ask you a question. I don't
20 know how else to do it. So if what you're saying is
21 that the two second requests that were sent weren't
22 on the affidavit form and so the office ignored them.
23 But Catalist did put it on a form, and so they
24 fulfilled it. And if you think that that is the
25 basis of my thinking that we're treated differently,

1 I would say that is not the basis under which I think
2 necessarily that we are treated differently.

3 Although, I would also, as I stated earlier, think
4 that your staff would reply to an email that they
5 received, and give people the affidavit form when
6 people don't file the proper form.

7 Q. Okay.

8 A. I can't say whether or not your staff -- or
9 the staff in the office, forgive me -- treated
10 similarly situated people who filed the request
11 incorrectly without an affidavit form, and ignored
12 them. I don't know the answer to that question.

13 Q. And you have no evidence to suggest that
14 has happened?

15 A. No, I do not.

16 Q. Okay. And if your attorney thinks -- or
17 what we've been referring to as your two FOIA
18 requests are relevant as to whether or not you're
19 being treated differently, then do you think it makes
20 a difference that Catalist actually complied with the
21 statutory requirements?

22 MR. GREIM: Objection, Your Honor. Now
23 she's asking if her attorney thinks something or
24 other, not --

25 THE COURT: Well, if she can't answer -- I

1 mean, she's the agent here. I'll allow some latitude
2 of the State asking these questions. Overruled.

3 A. I don't know the answer, m'lady, sorry.

4 Q. Okay. So now, you spoke about the actual
5 website; right? And you said that users had to click
6 on a box promising certain things?

7 A. When you first go to the website -- if
8 you've not been on the website, I'll try to --

9 Q. I'm sorry, can we just speak about the New
10 Mexico section of the website, while it was up, if
11 that makes sense, so we can --

12 A. I'm going to tell you when the disclaimer
13 comes up, if you'll allow. So when you first go to
14 the website, if you click on the website, the
15 disclaimer comes up, and you're required to agree to
16 all the terms before you can view anything on the
17 website at all.

18 Q. Okay. But no user was required to sign an
19 affidavit, were they?

20 A. No.

21 Q. And no user was required to sign something
22 like a contract, were they?

23 A. No.

24 Q. No user was required to sign anything?

25 A. That's correct.

1 Q. Just click, and off you go?

2 A. Agree to the terms of service and the
3 provisions therein, and then you are free to move
4 about the site, correct.

5 Q. And by "agree," you mean click, and in you
6 are?

7 A. I mean click the button that says that you
8 agree to abide by the terms and service of the site,
9 yes.

10 Q. But if I were to click on that box having
11 no intention to follow those terms, what would happen
12 to me, if anything?

13 A. Well, I would say you were a bad actor in
14 that situation, that if you did something wrong, then
15 you should be prosecuted, if you are found to have
16 done something wrong with the data. One would think
17 that if you clicked the agreement that you will not
18 use the data for commercial purposes, similar to if
19 somebody signs the affidavit and says we're not going
20 to do this. I mean, to my knowledge, the Secretary
21 of State doesn't track everybody that signs an
22 affidavit to see what they ultimately did with the
23 data.

24 Do we know what any campaign that acquired
25 the data from the Secretary of State did; if any

1 member of the campaign who had access to the data
2 took the names and sent out a mailer for fundraising?
3 I don't think you'd know unless somebody filed a
4 complaint. And then I would -- you know, they should
5 be prosecuted.

6 Q. Right. But isn't this a case in point?

7 A. What case is that?

8 Q. That the Secretary of State's Office is
9 prosecuting known violators of the Election Code?

10 A. I don't know. I have heard a lot about how
11 you were representing that you were not prosecuting
12 people for things that people don't agree on, whether
13 they're violations of the code or not. So I'm not
14 clear at this point. You guys were speaking pretty
15 quickly in the code, and not really naming who was
16 subject to what. So I'm not sure at this point.

17 Q. Okay. So you're saying that if I obtained
18 the data from your website, having no intention to
19 follow the promises that I make by clicking in that
20 box that you provide, I should be prosecuted;
21 correct?

22 A. Not if you have no intent to abide. If you
23 demonstrably misuse the data or use the data in a way
24 that is prohibited, and someone becomes aware of
25 that, okay. So, yeah, if it says this is what you're

1 allowed to do on the site with the data, and the data
2 says you can't use it for commercial purposes. If
3 someone does that, then they should be subject to
4 anything that applies.

5 Q. Okay. But if I haven't signed an affidavit
6 with the Secretary of State's Office promising,
7 actually a legally binding document, promising that I
8 will not use it for commercial purposes, how could I
9 possibly get prosecuted in your opinion?

10 A. Well, if somebody files a complaint that
11 the someone has taken the data off the site and
12 they're using it, then they should be referred to law
13 enforcement, because that's still a violation, is it
14 not?

15 Q. No.

16 A. So you're saying that, if a person -- so
17 let me back up. The National Voter Registration Act
18 says the voters list maintenance has to be done by
19 the public. And the voter list is a public record.
20 So I would say that the burden on prosecution is for
21 law enforcement to prove that someone is taking the
22 data and using it in a way for which they have agreed
23 not to use it. So that would be civil? I am not a
24 lawyer.

25 Q. And that was going to be my next question.

1 You're not a lawyer, are you?

2 A. No. I have legal teams that do this
3 analysis. I do not.

4 Q. Yet, you seem to feel that you understand
5 the National Voter Registration --

6 MR. GREIM: Objection, Your Honor. Asking
7 a bunch of legal questions that were argumentative.

8 THE COURT: Well, it is argumentative. But
9 it is cross, so I'll give her some leeway.

10 Q. I'll move on.

11 Okay. So you're familiar with the
12 ProPublica article, obviously, that brought all of
13 this?

14 A. Yes.

15 Q. So in that article, VRF is attributed to
16 saying or calling its work "unprecedented." Do you
17 agree with that statement?

18 A. I believe that it's the first of its kind,
19 yes.

20 Q. And then there is another attribution that
21 says -- and that's on page 6, if you'd like to take a
22 look.

23 A. Thank you.

24 Q. And that is one of the stipulated exhibits.
25 That would be Exhibit D. So on page 6 of the

1 article, it states that VRF -- "In announcing the
2 launch of its website, VRF touted it as a first of
3 its kind, searchable tool for all 50 states."

4 A. Can you help me find the exhibit, m'lady?
5 I'm sorry.

6 MS. SERAFIMOVA: May I approach the
7 witness?

8 THE COURT: You may.

9 A. Thank you. Gotcha. Page 6. I'm catching
10 up. I am with you. The page that says, "Starts with
11 continuing to employ" --

12 Q. "In announcing the launch of its website,
13 VRF touted it as a first of its kind, searchable tool
14 for all 50 states."

15 Do you agree with that characterization?

16 A. Yes. I'm still not on the right page. But
17 I agree that this is the first of its kind tool to
18 search all 50 states. Secretaries of State that
19 belong to the ERIC database have access to multiple
20 states' voter registration records as a part of ERIC.
21 But the public does not.

22 Q. Then, if I could also ask you to look at
23 P-1, which is your press release that you discussed
24 earlier?

25 A. Got it.

1 Q. Forgive me. It's on the second page,
2 second -- so we have a one-sentence paragraph, then
3 the next paragraph in the middle first sentence
4 says -- and this is something attributed to you --
5 "We're well on our way to accomplishing something
6 that has never been done before."

7 Is that a true statement?

8 A. Yes. To my knowledge, no one has ever
9 published the voter registration records for every
10 state online, for free, for the public forever, no.

11 Q. Catalist has not done that; correct?

12 A. I don't know all of Catalist's business, so
13 I could not say. I think they have clients. I don't
14 know. I know the political parties publish the data
15 online.

16 Q. Let me back up. You just said that to your
17 knowledge, no one else has done this. And yet, when
18 I asked you: Has Catalist done it, you say you don't
19 know. So which one is it?

20 A. So, to my knowledge, no other entity has
21 tried to publish all 50 voter registration records
22 for all 50 states for free. I believe Catalist
23 charges people for their services. I don't charge
24 anybody to access my data.

25 Q. When you say you believe, what is that

1 belief based on?

2 A. The belief is based on that they're
3 political consultants, who in my experience, don't --
4 or, you know, give things away for free. So that's
5 just my belief. I do not know.

6 Q. Okay. You do not know?

7 A. No.

8 Q. So, and the same question for i360. As far
9 as you know, they are not doing what VRF wanted to do
10 with New Mexico?

11 A. I360 has all the data for the states. And
12 they have it on apps, and they give it to members of
13 the party, like precinct committeemen who do
14 canvassing or people who can get out the vote. So
15 i360 pays, I believe, for the data. And I think they
16 marry that data to other meta data.

17 Q. So their product sounds something very
18 different?

19 A. It does to me. What I'm trying to do is
20 give public access for free. I'm not trying to
21 charge anybody.

22 Q. Okay. Now, part of your claim today, and
23 in this case today is that Catalist, and potentially
24 i360 are doing something illegal, but they have not
25 been referred for prosecution by the Secretary of

1 State's Office; is that correct? If you know, if you
2 understand.

3 A. If the position of the Secretary of State's
4 Office --

5 Q. If you can answer my question, please.

6 A. Well, I'm thinking it through, if I may.
7 Because I'm not sure I'm following you. So this way
8 you can stop me if I'm wrong about where I'm going.
9 If it's the new position, which I understand it to be
10 a new interpretation by the Secretary of State's
11 Office, is that now, no one can use the data or
12 transfer the data to anyone, then I would think that
13 those other entities are also in violation of your
14 new interpretation of that.

15 Q. Now, when you say "new," when do you
16 believe this new interpretation came about?

17 A. I do not know. I sat here this morning and
18 listened to both of your opening statements. And you
19 both seemed to suggest that this is a new
20 interpretation.

21 Q. Okay. But you, yourself, don't know?

22 A. I myself, no, I do not.

23 Q. So you don't think it's new? You're just
24 repeating what you heard?

25 A. I am repeating what I have heard.

1 Q. Okay. So with that interpretation that you
2 just shared, do you believe that Catalist is doing
3 something that we should feel or think is illegal
4 under New Mexico law; is that right? It's a
5 question --

6 A. I'm just looking, because you're into kind
7 of deep legal issues that I really don't know the
8 answers to all your questions. And I don't want to
9 make assumptions that are incorrect or mislead you.

10 Q. Let me just cut to the chase.

11 A. Yeah.

12 Q. Have you ever referred Catalist to the
13 Secretary of State's Office as a potential violator
14 of New Mexico State law?

15 A. No, I have not.

16 Q. Do you have any knowledge of anyone making
17 such a complaint?

18 A. No, I do not.

19 Q. Okay. Moving on to the press release. It
20 is a press release; correct?

21 A. Yes.

22 Q. Who writes this press release for VRF, and
23 similar, but this in particular?

24 A. The media arm of my foundation. And then I
25 edit it. If I don't like what it says, I change the

1 language, and I ping it back and forth until I think
2 it's okay.

3 Q. But you're not a journalist yourself?

4 A. No. I do blog posts about data, and I
5 report my analysis of the data. But I wouldn't call
6 myself -- I have never been to journalism school.

7 Q. So you've never been formally trained in
8 journalistic ethics, for example?

9 A. No.

10 Q. Are there any members of your media team
11 that you would call journalists with formal training?

12 A. Yes.

13 Q. There are. Who -- or how many? Let's keep
14 it --

15 A. Well, Dan Curry is a journalist, and he is
16 one of the people who writes these for me.

17 Q. When you say he's a journalist, what do you
18 mean?

19 A. I mean, he worked in major media in the
20 past as a journalist. That was his title:
21 Journalist.

22 Q. And do you know what education he has?

23 A. I'm so sorry, no, I do not.

24 Q. That's fine. Okay. So we have perhaps one
25 person with journalistic experience on staff; is that

1 fair?

2 A. Possibly. I don't know the background of
3 everybody. So I'll go with ya.

4 Q. Well, I'm going with you, actually. So
5 let's keep --

6 A. I do not know how many people that work in
7 the organization have a journalistic background with
8 regard to education.

9 Q. Education, or --

10 A. Well, you asked me if anybody had been
11 educated in the ethics of a journalist. So I presume
12 you were talking about having, like, a journalism
13 degree, or having worked in a journalism shop, and
14 discussed AP. This is a vocabulary we use in an
15 article, and this is what AP considers to be ethical,
16 that kind of thing.

17 Q. Okay. All right. So let's look at --
18 well, if we can just look at P-1 and P-2, which are
19 the two documents you discussed during your direct
20 examination. They talk about what you've referred to
21 as the discrepancy in New Mexico, right?

22 A. Yes.

23 Q. Okay. So what your document and what your
24 math showed was that, on November 3 -- and I'll round
25 up, if that's okay -- but on November 3, 928,000-plus

1 voters were reported by canvassing boards and just
2 the official turnout; is that correct?

3 A. The 928,172, yes, is the turnout of how
4 many ballots were cast.

5 Q. Okay. So 928,172 ballots cast November 3?

6 A. Correct.

7 Q. And then you compare that to the number,
8 924,328, which is the number of people shown to have
9 voted on November 3 on the voter rolls that you
10 received from the Secretary of State's Office?

11 A. That's the number of electors whose records
12 still exist in the voter file as of April of 2021,
13 who have a vote credit for casting a ballot in the
14 November 3, 2020 general election.

15 Q. Okay. You said something important there.
16 "Whose records still exist."

17 A. Yes.

18 Q. So your math says 928 on November 3, but by
19 April 13, 924 still exist?

20 A. Yes.

21 Q. Okay. So where is the problem?

22 A. The problem is that -- well, I would say
23 the problem is the numbers don't reconcile. And
24 nobody in the Secretary of State's Office responded
25 to our email to say: Well, here in New Mexico we

1 archive voters. When we cancel them, we delete them.
2 We move them. We purge them. So we don't know the
3 answer to the question of why they don't balance
4 because nobody in the New Mexico office responded to
5 our request for us to understand, which is why I say,
6 if we could please discuss with you and get a better
7 understanding. And I say, please provide feedback,
8 and if there is a factor or factors we may be unaware
9 of, that would explain the discrepancies. And you
10 are asking literally -- every state does it
11 differently. So as I said, Nevada deletes you
12 totally. West Virginia --

13 Q. Can I stop you there, because I just want
14 to -- we are pressed for time, so --

15 A. Sure.

16 Q. But the bottom line is, you don't know why
17 there is a difference; right?

18 A. Correct; that's why I say "discrepancy."

19 Q. Okay. But in your press release, right,
20 you say, "These discrepancies don't necessarily
21 indicate fraud, but the differences between the voter
22 list and the election canvass indicates at the very
23 least issues with recordkeeping."

24 You don't know that, do you?

25 A. I would say that what I stated in this

1 press release is absolutely correct. And so I'm
2 going to go to another state for a minute.

3 Q. No --

4 A. Well, no, you asked me a question, and I'm
5 going to answer.

6 MS. SERAFIMOVA: Your Honor, I ask for your
7 assistance.

8 THE COURT: If Mr. Greim wants to bring
9 something out, he will.

10 THE WITNESS: Okay.

11 THE COURT: You answer Ms. Serafimova's
12 questions, and then Mr. Greim can bring it out.

13 THE WITNESS: Thank you, sir.

14 A. The standard is --

15 Q. If I may, let me just restate my question
16 so we can get back on-track.

17 A. Okay.

18 Q. So you just admitted that you don't know
19 why there is a difference in the two numbers, and yet
20 on December 16th you published in a press release the
21 statement that "at the very least, there are issues
22 with recordkeeping"?

23 A. And that is correct. That statement is
24 correct. There are issues with recordkeeping. You
25 do not have a record of the canceled voters in the

1 file in April, and you should. You should have a
2 record of every voter in the file.

3 Q. How do you know what's in the file?

4 A. I looked at the file.

5 Q. You have looked at voter data, which is
6 something like a spreadsheet. You don't know --

7 A. No, I looked at the raw file from the
8 database. It's an export of the raw file from your
9 database, from the Secretary's database.

10 Q. So you have looked in the voter files that
11 are kept at the Secretary of State's Office, that are
12 not on the online system; is that what you're
13 representing to us?

14 A. I am representing to you that the Secretary
15 of State's Office provided an export of the data in
16 the file that is available to members of the public
17 who properly complete the affidavit form.

18 Q. Okay. So by statute, voter data actually
19 only includes name, gender, address, party
20 affiliation, and voting history?

21 A. Correct. Voting history. So why would
22 there be voting history that is missing in the file?

23 Q. But there isn't. Where do you say here
24 that there is voting history -- there are people that
25 are missing, but not their voting history.

1 A. See, that's what I'm saying. That's a
2 recordkeeping issue. The vote history should still
3 be there in some form, even if the voter is no longer
4 active, or inactive. If you remove the voter and
5 their vote history, then your numbers don't
6 reconcile. And that is what I am referring to as an
7 issue with recordkeeping.

8 Q. Okay. Let's walk through a few examples.
9 Let's say I voted November 3, right? And then, after
10 having a little too much fun January 1st, I get
11 arrested. By March, I'm convicted of a felony.
12 Corrections Department sends that information to the
13 Secretary of State's Office. By April 13, I am not
14 legally constitutionally allowed to vote in New
15 Mexico anymore, and I am taken off of the voter
16 rolls. And so I don't show up in your file. Do you
17 think there is an issue of recordkeeping at the very
18 least?

19 A. I absolutely do. You should show up as a
20 canceled voter, and your vote history should still be
21 there.

22 Q. And that is your personal opinion?

23 A. That is the opinion and that is the
24 standard that everybody should set. And if every
25 state did that, then we would not have discrepancies.

1 The numbers would reconcile.

2 Q. When you say, "should," that's your
3 personal opinion?

4 A. That's a public policy discussion, yes.

5 Q. But you are not a public policy --

6 A. I'm a subject matter expert in elections
7 data, yes, I am.

8 Q. Who has qualified you as a subject matter
9 expert? Not your attorney. Certainly not.

10 A. I am someone who has worked for about 25
11 years in advocacy work for election integrity, and
12 has served under two administrations in the Secretary
13 of State's Office, and is a certified deputy
14 registrar and was a certified election official in
15 the State of Arizona. And I'm saying in that
16 capacity that I believe there is an issue of
17 recordkeeping if, when a voter is canceled for any of
18 the legitimate reasons for which they're canceled,
19 their entire voter history and their record is
20 removed in such a way that the public cannot
21 reconcile the data between the number of ballots that
22 were cast in an election and the number of voters who
23 voted. That is what I am saying, and that is what I
24 am saying in this press release, yes.

25 Q. Well, and I'm trying to understand exactly

1 what you're saying. So you disagree with the way the
2 New Mexico electronic voter system is run,
3 fundamentally; correct?

4 A. Well, I don't know all the details about
5 how the New Mexico voter registration -- you just got
6 through telling me that I don't have access to all
7 the data; that only certain data is released. So I
8 can't make an opinion about data that I haven't seen.

9 Q. Yet you have a lot of opinions, and you're
10 making them publicly about New Mexico --

11 A. I am. I do under freedom of speech.

12 Q. Okay. Without data; correct?

13 A. I'm sorry?

14 Q. Without complete data, you make these
15 conclusions --

16 A. No, I asked for the complete data, but --
17 (Simultaneous unintelligible crosstalk.)

18 THE COURT: When Ms. Serafimova asks a
19 question, or speaks, you'll have to stop.

20 THE WITNESS: Yes, sir.

21 THE COURT: So don't talk over her. Once
22 she starts speaking, you let her control her
23 examination.

24 THE WITNESS: Thank you, sir.

25 THE COURT: All right. Ms. Serafimova.

1 MS. SERAFIMOVA: Thank you, Your Honor.

2 Q. So another hypothetical: I vote November
3 3. January, something happens, I move to Colorado.
4 I registered there to vote. Colorado shares that
5 information with the Secretary of State's Office. So
6 by April 13, I don't show up on your file. Do you
7 still think there is a recordkeeping issue at the
8 very least, yes or no?

9 A. Yes.

10 Q. And then I vote November 3. January, I'm
11 disappointed with the results, I say: I'm never
12 doing this again. I cancel my registration. By
13 April 13, I am no longer on that file that you
14 receive. You still believe that at the very least
15 there is an issue of recordkeeping, yes or no?

16 A. Yes.

17 Q. And then least favorite hypothetical: I
18 vote number 3, and then I die before April 13. So by
19 the time you get that file from the Secretary of
20 State's Office, I am not on there. You still believe
21 that at the very least there is an issue of
22 recordkeeping, yes or no?

23 A. Yes.

24 Q. All right. And however, the Vote Ref
25 website does not explain any of this, right; it does

1 not explain what your belief is actually based on,
2 yes or no?

3 A. Yes. I believe --

4 Q. It does not explain, yes?

5 A. No, I would say that, yes, it explains. So
6 there is another website called VoterReference
7 Foundation.com, where I put up more editorial pieces.
8 The very piece on there talks about voter
9 registration records with like 1/1/1900 as the date
10 of birth. So I speak about it. The Vote Ref website
11 is purely data. There is no commentary anywhere on
12 there. So I link to the other website for
13 commentary.

14 Q. Okay. So if, in discovery in this case, we
15 request any and all documents that show where you
16 explain that these discrepancies, what you call
17 discrepancies, could be based on perfectly legitimate
18 and reasonable reasons, we will find a document that
19 contains that explanation, yes or no?

20 A. Yes.

21 Q. Okay.

22 A. And video.

23 MS. SERAFIMOVA: We will -- on the record,
24 that's one of our first discovery requests.

25 Q. Okay. Now, a number of states have

1 disputed your methodology, yes or no?

2 A. I'm unaware.

3 Q. You're unaware?

4 A. You're saying a "number of states." The
5 ProPublica article had comments from states that
6 states didn't make to me. So, yes, based on
7 ProPublica article, some states had commentary.

8 Q. Okay. According to that article, it says,
9 on page 3, that they reached out to 12 states
10 including New Mexico.

11 A. Where are we in the exhibits, m'lady?

12 Q. So this is stipulated Exhibit D, page 3.
13 It says that they reached out to Colorado,
14 Connecticut, Georgia, Michigan, Nevada, New Jersey,
15 New Mexico, North Carolina, Ohio, Pennsylvania,
16 Virginia, and Wisconsin. And that's as of March of
17 this year, right, or prior to the publication of the
18 article? And it says, "In every case, the officials
19 said that the methodology used to identify the
20 discrepancies was flawed, the data incomplete, or the
21 math wrong."

22 MR. GREIM: Your Honor, I object. I
23 actually don't see this, not on page 3. I don't know
24 where Counsel is reading from.

25 A. I think it's the second paragraph on page

1 4.

2 MS. SERAFIMOVA: My apologies. And I think
3 this printout is just different from mine.

4 MR. GREIM: The paragraph I see is about
5 ProPublica contacting these people.

6 MS. SERAFIMOVA: Correct, yes.

7 Q. Okay. So when you read that in the
8 ProPublica article, did that concern you?

9 A. The entire ProPublica article concerned me.

10 Q. I'm asking the fact that 12 states believe
11 that your methodology -- despite your experience, and
12 despite your qualifications, 12 other states -- 12
13 states, not other -- because you don't actually
14 represent a state; correct?

15 A. No, I'm representing Voter Reference
16 Foundation, correct.

17 Q. So 12 election officials disputed --
18 according to ProPublica -- disputed your methodology.
19 Did that concern you at all?

20 A. Is that a yes-or-no question?

21 Q. Yes. Yes or no, did that concern you?

22 A. I'm ambivalent. So it's not really a yes
23 or no answer.

24 Q. Okay. So you're ambivalent to the
25 feedback?

1 A. Yes.

2 Q. All right. And you didn't change anything
3 about your methodology after receiving this?

4 A. No, I started sending snapshots. I think
5 it was earlier than the publication of this article I
6 started sending snapshot and look-back FOIAs to
7 account for cancellations, and get closer to November
8 3.

9 Q. And then, what I believe was page 5 of the
10 article -- but it may be page 6 in your binder -- you
11 are quoted as having said, "In each of the states
12 we've researched to date, the election data math
13 simply doesn't add up."

14 A. That requires reform. "We seek this reform
15 through the sustained spotlighting of accuracy," yes,
16 that's me.

17 Q. And this was based simply on taking one
18 number and subtracting a different number, and
19 receiving something other than a zero; is that right?
20 Like in New Mexico: 928 minus 924. The answer is
21 greater than zero, we need reform; yes or no?

22 A. The files are incomplete, yes, we need
23 reform. Yes, correct.

24 MS. SERAFIMOVA: Okay. No other questions.
25 Thank you.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you, Ms. Serafimova.

3 Mr. Greim, do you have redirect of Ms.

4 Swoboda?

5 MR. GREIM: Your Honor, I don't think we
6 actually do.

7 THE COURT: Okay. All right. Ms. Swoboda,
8 you may step down. Thank you for your testimony.

9 MR. GREIM: Your Honor, I have a question
10 about how late --

11 THE COURT: We're going to have to do a
12 drop-dead about 5:30. The building kind of turns
13 into a pumpkin about that time. So give it the best
14 shot you have. And if we need to reschedule -- I
15 know you're from out of town and stuff, if we need to
16 do some stuff by Zoom, as long as y'all agree, I'm
17 game. I'll try to make it as easy for you as
18 possible.

19 MR. GREIM: We're flying to Kansas City in
20 a small plane, and supposedly, there are
21 thunderstorms.

22 THE COURT: That's not the place I'd want
23 to go in a small plane.

24 MR. GREIM: I think what we might do, Your
25 Honor, in order to get a little more of our folks

1 in -- if it's almost 5:00 right now -- I would
2 normally have called my next plaintiff here, she's
3 right here. I think I would like to try to get to
4 Ms. Vigil, the Secretary of State's --

5 THE COURT: Would that be okay with you?

6 MS. SERAFIMOVA: Well, Your Honor, if we
7 can agree to a stipulation, as it were, I do have
8 just two minutes of questions, I think, for Ms.
9 Steinberg. And it goes to standing, which is the
10 jurisdictional, and it's very important for our case,
11 I believe. So if we can do that --

12 THE COURT: Do you mind her asking those
13 questions?

14 MR. GREIM: Well, I say, if we're going to
15 do that, I wouldn't mind her --

16 THE COURT: Just put her on?

17 MR. GREIM: Put her on. We'll do it.

18 THE COURT: Okay. All right.

19 Ms. Steinberg, if you'll come up and stand
20 next to the witness box. Before you're seated,
21 Ms. Rotonda will swear you in.

22

23

24

25

1 HOLLY STEINBERG,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE COURT: Ms. Steinberg. Mr. Miller.

6 BY MR. MILLER:

7 Q. Can you please state your name for the
8 record?

9 A. Holly Steinberg.

10 Q. Ms. Steinberg, where do you live?

11 A. Here in Albuquerque.

12 Q. And what do you do for a living?

13 A. I am retired, but I just recently, about a
14 year ago, went to work for a nonprofit organization
15 to help them out part-time.

16 Q. What did you do before you retired?

17 A. I was an administrator at 911.

18 Q. And what do you do now at your new job?

19 A. My new post, I am helping to build a
20 grassroots organization. And I contact people to see
21 if they are interested in being a part of that.

22 Q. Okay. Are you a registered voter?

23 A. I am.

24 Q. You mentioned that part of your job is, you
25 know, working with grassroots groups. Have you been

1 involved in grassroots or political groups outside of
2 your new job?

3 A. I have volunteered to help my ward in the
4 Republican Party. I was asked to help start
5 contacting people to join in meeting, and letting
6 people know what's going on. And I have done that
7 very little, but somewhat. And so in that regard,
8 I'm involved in getting the word out and calling
9 people on the phone.

10 Q. Are there particular issues that you focus
11 on when you're trying to get the word out, as you
12 said?

13 A. In that regard, no, just letting them
14 become familiar with there is a ward; there is a
15 chair; there is a process that we go through to meet
16 to get everybody involved, and let them know what's
17 going on.

18 In my other capacity, in the grassroots
19 area, I do more issue-based work, and I reach out to
20 people through a survey, and request them give us
21 opinions on what they feel are important issues in
22 the state.

23 Q. Would you say that you're generally
24 concerned or interested in voter participation?

25 A. Oh, absolutely.

1 Q. And what about voter or election
2 transparency?

3 A. Absolutely.

4 Q. You've talked about some of these
5 activities you've engaged in with different groups
6 and different issues. Have any of those activities
7 changed recently, say, in the last two or three
8 months?

9 A. My activities, or --

10 Q. Yes, your activities relative to those
11 groups or with those groups?

12 A. Well, part of working with the Republican
13 Party in my ward, making phone calls, it was rather
14 difficult to find information to be able to phone
15 call people and say: Hey, would you be interested in
16 coming to a meeting on Tuesday night or whatnot. I
17 couldn't find data. And a lot of times I'd spend
18 time looking on the internet finding phone numbers or
19 some way to contact people. I'm old enough that I
20 don't want to go door to door. I'm not very capable
21 of that. So I've stopped doing that so much. As of
22 recent, I've not made a lot of effort to forward that
23 movement.

24 Q. Have you ever reviewed your own voter
25 history?

1 A. I have.

2 Q. How did you do that?

3 A. First of all, the Secretary of State, I
4 looked my information up on that; both my husband and
5 I did that, just to see if it was accurate. And it
6 is. The other area that was when I first became
7 aware of this suit, I went to Voter Reference and
8 looked up my information.

9 Q. So how are you familiar kind of with this
10 case or how did you get involved with this case?

11 A. My boss was talking about -- we were
12 talking about elections, and we were talking about
13 this, and I became aware of it that way.

14 Q. If the data on VoteRev.com -- now down for
15 New Mexico -- was still available, would you use it?

16 A. I would, if it would help me contact people
17 and get them involved in knowing what's available in
18 terms of meetings and communication, yes.

19 Q. If it was made available again, would you
20 use that data?

21 A. I think I would.

22 Q. And you kind of just went into this, but
23 how would you foresee yourself using that data?

24 A. Well, you start with contacting people who
25 have most recently participated in a vote, a primary

1 or a major election. Because we are -- those are
2 active people. And you start there, and then you
3 also ask them to reach out to others around them,
4 neighbors, friends, and ask them to -- if they're in
5 the same community -- to participate in upcoming
6 meetings, and get to know what's going on so they
7 have additional sources of information.

8 Q. We've heard a lot of talk about this idea
9 of crowd sourcing, kind of checking the veracity of
10 voter information and databases, whether it's New
11 Mexico, or elsewhere. Would you engage in that kind
12 of crowd sourcing to ensure just that it's accurate
13 to the best of your knowledge?

14 A. You know, I think it's a good idea,
15 whenever there is information out there about
16 yourself, to make sure it represents you correctly.
17 And I encourage others to do the same thing. Some of
18 the process of going through and making calls and
19 contacting people in my community is -- it's
20 difficult, because there is really no central source
21 of information. So I do think that people need to be
22 aware of that and go out and use the tools that are
23 available so they can check and see.

24 Q. Would you ever deliberately use voter data
25 in a way that's unlawful?

1 A. I would hope not. That would never be my
2 intention.

3 Q. What effect has this case and what you know
4 about it had on your willingness to discuss issues
5 surrounding voter data?

6 A. It's just kind of given me a feeling of
7 walking on eggshells. I want to make sure I'm doing
8 the right thing. Integrity is important to me. And
9 so I just want to make sure that I don't do anything
10 that would be construed as incorrect.

11 Q. Have you ever thought about getting voter
12 data directly from the New Mexico Secretary of State?

13 A. I have thought about it. It's not
14 something I have avidly pursued. I understand it can
15 be a costly thing, so I have not pursued that avenue.

16 MR. MILLER: I don't have anything else at
17 this moment.

18 THE COURT: All right. Thank you, Mr.
19 Miller.

20 Ms. Serafimova, do you have
21 cross-examination of Ms. Steinberg?

22 MS. SERAFIMOVA: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. SERAFIMOVA:

25 Q. Hello, again, Ms. Steinberg.

1 A. Hi.

2 Q. So we've been discussing an affidavit
3 required by statute. Do you know what I'm talking
4 about when I say the "affidavit"?

5 A. Yes.

6 Q. Would it help if I showed you a copy of it?

7 A. Sure.

8 Q. If you could take a look in your binder,
9 the tabs that have A through L. If you could go to
10 tab J. So this is the most -- you know, the most
11 recent version of the affidavit that we've been
12 talking about, there are other versions but they look
13 very similar. Have you ever -- you've never signed
14 one of these documents, one of these affidavits, have
15 you?

16 A. No.

17 Q. And, therefore, you've never submitted one
18 to the New Mexico Secretary of State's Office;
19 correct?

20 A. No.

21 Q. Okay. You've never submitted one to any
22 clerk's office in New Mexico; correct?

23 A. No.

24 Q. You have never paid a fee to the Secretary
25 of State's Office or any clerk's office for voter

1 data, have you?

2 A. No.

3 Q. And, in fact, in one of the pleadings, I'll
4 represent to you that in your -- meaning you as the
5 plaintiff -- in your memorandum in support of the
6 motion for preliminary injunction, your attorneys
7 made the representation that you -- it says,
8 "Plaintiff Steinberg does not have the means or
9 desire to independently pay for the data set." Is
10 that a true statement?

11 A. Most likely. I don't know exactly the
12 amount. But I do not have a lot of discretionary
13 income. I'm retired, I'm on limited income, with the
14 exception of my little part-time job. But I would
15 say that would be correct.

16 Q. Okay. Because it is in one of your
17 pleadings, so do you have any concerns about -- I
18 need to know is it a correct statement or is it not?

19 A. It's a correct statement.

20 Q. Okay. And so you don't have the means to
21 pay for voter data, you don't intend to ever do so;
22 correct?

23 A. Correct.

24 Q. And you've never submitted the affidavit
25 required to get that data; correct?

1 A. Correct.

2 Q. And, in fact, you don't have any voter data
3 in your possession, do you, from any source?

4 A. Other than being able to look it up on the
5 state site for my own self, and my husband, for him.

6 Q. Yes. But the voter data here at issue, for
7 example, the statewide file that we've been
8 discussing, you don't have that in your possession;
9 correct?

10 A. I don't. I was given by the ward, I was
11 given some information on a phone list to call people
12 that are in my little neighborhood on my street.

13 Q. But you obtained that through a request you
14 made of some sort?

15 A. I didn't make a request. It was obtained
16 through the chair of our ward.

17 Q. And when you say "our board" --

18 A. Ward.

19 Q. Oh, ward. I'm sorry, what are you
20 referring to?

21 A. Our little district.

22 Q. Okay. So not from the Secretary of State's
23 Office?

24 A. No.

25 Q. And so -- I'm sorry, I need to understand

1 what you're talking about. So you received -- what
2 exactly did you receive?

3 A. They gave me a list of names of people that
4 live on my street. And I tried to look up their
5 numbers through the internet through any program I
6 could find to try to call them and invite them to a
7 meeting.

8 Q. And so when we speak of voter data, that's
9 actually a term defined under the law, and it refers
10 to information derived from the voter files that the
11 Secretary of State's Office maintains for each and
12 every registered voter in New Mexico. So when I
13 refer to voter files -- or I'm sorry, "voter data,"
14 with that definition, do you possess any voter data?

15 A. To my knowledge, no.

16 Q. And so if you don't possess it, you cannot
17 sell it, can you?

18 A. No.

19 Q. And if you don't possess it, you cannot
20 loan it to anybody?

21 A. Correct.

22 Q. And you cannot provide access to it to
23 anyone?

24 A. Correct.

25 Q. And you could not surrender it, however we

1 define that term; correct?

2 A. Correct.

3 Q. And so would you agree that, essentially,
4 what you would like is to have access to that data on
5 a website, such as VRF? Is that a true statement?

6 A. I would like to have contact information so
7 I could make my calls and let people know there are
8 meetings in their little community that they can go
9 to to learn more about what's going on with the
10 election.

11 Q. And you would like to have that for free?

12 A. In an ideal world, yes.

13 Q. Okay. And one other thing you mentioned,
14 you mentioned that you believe people should check
15 whether or not their information is correct. Do you
16 remember that?

17 A. I do.

18 Q. And you were able to do that, were you not?

19 A. On the Secretary of State site, yes. And
20 one time on the Voter Reference site.

21 Q. But even without the website, you were able
22 to check your own information on the Secretary of
23 State's Office; correct?

24 A. That's correct.

25 Q. And you were also able to check your

1 husband's information on that website?

2 A. He was able to do that, yes.

3 Q. Okay. He was able to, or did you do it for
4 him?

5 A. He was able to do that.

6 Q. And he shared that with you?

7 A. Yes. We sat down and did it together.

8 MS. SERAFIMOVA: Thank you. No further
9 questions.

10 THE COURT: All right. Thank you,
11 Ms. Serafimova.

12 Mr. Miller, do you have redirect of Ms.
13 Steinberg?

14 MR. MILLER: I have one question.

15 REDIRECT EXAMINATION

16 BY MR. MILLER:

17 Q. Ms. Steinberg, it is true that you would
18 like access and would use data from VRF if it was
19 made available again?

20 A. Yes.

21 MR. MILLER: Nothing further.

22 THE COURT: All right. Thank you, Mr.
23 Miller.

24 Any further questions?

25 MS. SERAFIMOVA: No, Your Honor.

1 THE COURT: All right. Ms. Steinberg, you
2 may step down. Thank you for your testimony.

3 All right. Mr. Greim, do you have your
4 next witness or evidence?

5 MR. GREIM: We'll call Ms. Vigil.

6 THE COURT: All right. Ms. Vigil, if
7 you'll come up and stand next to the witness box.
8 Before you're seated, Ms. Rotonda will swear you in.

9 MANDY VIGIL,
10 after having been first duly sworn under oath,
11 was questioned and testified as follows:

12 DIRECT EXAMINATION

13 THE COURT: Ms. Vigil. Mr. Greim.

14 BY MR. GREIM:

15 Q. Ms. Vigil, what is your title?

16 A. The State Elections Director.

17 Q. What are your duties?

18 A. I oversee the administration of the Bureau
19 of Elections. So we are responsible for assisting
20 county clerks, election administrators across the
21 state with adhering to the Election Code. So there
22 are a lot of different programs that go into that
23 administration, but generally, that is the
24 responsibility.

25 Q. How many people report to you?

1 A. Ten.

2 Q. Sounds like you're bigger than Arizona.

3 Who do you report to directly?

4 A. I report to the Deputy Secretary of State
5 and the Secretary of State.

6 Q. That's Ms. Pino and Secretary
7 Toulouse-Oliver?

8 A. Correct.

9 Q. You oversee the process of applying for and
10 making available voter data?

11 A. I do.

12 Q. The whole thing that we've been here today
13 about; right?

14 A. All processes that are included in the
15 Election Code, correct.

16 Q. Is it the Secretary of State's duty to
17 ensure that voter data is disclosed to requesters in
18 accordance with the law?

19 A. It is.

20 Q. And to ensure that the voter data is then
21 used by those requesters in accordance with the law?

22 A. We do have an obligation to follow the
23 state statute, correct.

24 Q. What does the Secretary of State -- well,
25 let me just ask it this way: I take it the Secretary

1 of State probably does several things to make sure
2 that the law is being followed in New Mexico; right?

3 A. We're responsible for providing an
4 administrative process to access that data. And if
5 we become -- if we're made aware that there is some
6 sort of concern with how that data is being used, the
7 Election Code provides us with an opportunity to
8 refer that to a law enforcement agency.

9 Q. Do you do anything other than just make the
10 administrative process available?

11 A. We also provide information to voters,
12 requesters. And we are also responsible for
13 providing guidance and training to other election
14 administrators, such as the county clerks.

15 Q. Okay. So, you know, I know at the federal
16 level there is formal guidance, informal guidance,
17 frequently asked questions, all kind of things. But
18 I see that on your website you have some informal
19 guidance on the law relating to disclosure of voter
20 data. You have some of that; correct?

21 A. Correct.

22 Q. So if you look at P-3, for example. Again,
23 I think that binder just has the number 3.

24 A. Okay.

25 Q. If you see this is a multi-page document,

1 and I'll tell you we pulled it from your website.

2 Does this document contain some of the guidance that
3 you make available to requesters?

4 A. As a resource.

5 Q. And you try to make sure that this material
6 is completely accurate; correct?

7 A. Yes.

8 Q. And is correct under New Mexico law?

9 A. Correct.

10 Q. Okay. You talked about an administrative
11 process. Are you basically referring to the process
12 by which you accept an affidavit from people?

13 A. The state law does require that we collect
14 an affidavit, and that we also log the requester, and
15 maintain that log.

16 Q. Have you ever rejected an affidavit or
17 denied a request by affidavit?

18 A. No.

19 Q. Have you ever looked at who the requester
20 is to make sure they say that they are who they say
21 they are?

22 A. If you can clarify?

23 Q. Sure. If somebody -- you know, if you get
24 a request and, you know, it says, you know, Mick
25 Jagger requesting on behalf of, you know, the New

1 Mexico Democratic Party, do you do anything to make
2 sure that that's a real person and a real
3 organization requesting the data?

4 A. The form needs to be complete. It needs to
5 be signed. And they need to agree to the terms
6 through their signature. But we do not investigate
7 through a call or reaching out to them, no.

8 Q. Is it fair to say that you've only done two
9 investigations of requesters?

10 A. We have not done any investigations of
11 requesters.

12 Q. Well, okay. Have you done an investigation
13 of Local Labs and VRF?

14 A. We did refer both Local Labs and VRF to the
15 Attorney General's Office due to the use, and our
16 concerns with the data being made available online.

17 Q. And you investigated to come up with the
18 facts that you put into your referral letter;
19 correct?

20 A. We did research the facts to provide,
21 correct.

22 Q. And you've also investigated another
23 entity -- and I'm going to get this wrong -- it's out
24 of Otero County, I think.

25 A. I think it's important that we clarify that

1 we don't have investigators. We're not a law
2 enforcement agency. We did review and we did provide
3 the facts to the best of our knowledge, and turn
4 those over to someone who does have an investigator.

5 Q. And by the way, you determined that this
6 Otero County group is not connected to VRF; correct?

7 A. We have not made any determination of a
8 connection.

9 Q. So does the Secretary of State still
10 believe -- does it believe that VRF is connected to
11 this Otero County group?

12 A. I don't think we have that information.

13 Q. Have you ever become aware of a potential
14 violation of the law until ProPublica contacted your
15 office regarding Local Labs and VRF?

16 A. That is the first time we were made aware.

17 Q. Now, we talked -- let's change gears for a
18 second here. We talked about informal guidance on
19 the Secretary of State's website. The Secretary of
20 State also makes numerous statements about New Mexico
21 law in this area, doesn't she?

22 A. I don't know what you're referring to.

23 Q. Okay. I'm sorry, you're not aware that the
24 Secretary of State, the person you directly report
25 to, has made statements about New Mexico law and

1 voter data?

2 A. Yes, she has made statements.

3 Q. And does the office first ensure that those
4 statements are accurate before they are made?

5 A. If you're referring -- if you could be
6 specific about a certain statement. But, generally,
7 anything that we provide to the public, yes, it is
8 reviewed to ensure that it's accurate.

9 Q. Are you aware that the Secretary of State
10 has ever made a statement to the public about access
11 to voter data that was incorrect?

12 A. No.

13 Q. So it's your position that the statements
14 of the Secretary -- and we'll go through them, I'm
15 just getting some generalities here first -- it's
16 your position that the statements the Secretary of
17 State has made about access to voter data have all
18 been correct under New Mexico law?

19 A. I can't speak to a statement without
20 knowing what you're referring to. I can answer that
21 our office publicly makes information available that
22 is accurate and correct.

23 Q. Okay. Well, we'll go through the
24 individual ones here in just a moment.

25 Let's talk about the forms now. Who

1 designs the forms?

2 A. Someone in the Bureau of Elections.

3 Q. Okay. Who approves them?

4 A. I participate in that approval, along with
5 a legal review, usually done by our general counsel
6 or our Deputy Secretary of State.

7 Q. Has the Secretary of State's Office ever
8 authored a form that was inaccurate under New Mexico
9 law?

10 A. Ever in the history of the office, I can't
11 speak to.

12 Q. Okay. Fair enough. Let's say in the last
13 two years?

14 A. Not to my knowledge.

15 Q. So we're going to look through these forms
16 in a second. But your testimony is that every single
17 form that's been used in the last two years has been
18 consistent with New Mexico law?

19 A. I think you're referring to the affidavit.
20 And so we did make a correction to that affidavit
21 once we were made aware that it needed to more
22 strictly align to the statute. So there was a
23 correction made to the affidavit.

24 Q. Okay. Well, let's just jump right into
25 that. I wasn't going to do that quite yet, but now

1 I'm interested. Who made you aware that there was a
2 problem with the affidavit?

3 A. At the time, it was our then records
4 custodian.

5 Q. Who was that?

6 A. Her name was Raina Trujillo.

7 Q. When did this take place?

8 A. It was back in early 2021.

9 Q. Let's just go ahead and take a look at it.
10 I'm going to have you take a look at Exhibit A. Do
11 you recognize this document?

12 A. I do.

13 Q. What is it?

14 A. It is a voter information authorization
15 form.

16 MR. GREIM: By the way, Your Honor, this is
17 where I usually move to admit it. I don't know if I
18 need to do this or not, but I think we would jointly
19 move for admission of all the stipulated exhibits.
20 This is the very first one.

21 THE COURT: When you say "stipulated," is
22 that everything in this book?

23 MR. GREIM: It's everything that's got a
24 letter.

25 THE COURT: A letter on it.

1 MR. GREIM: A through L.

2 THE COURT: No objection to A through L.

3 MS. SERAFIMOVA: No.

4 THE COURT: Are these Joint Exhibits, A
5 through L?

6 MR. GREIM: They are.

7 THE COURT: All right. So Joint Exhibits A
8 through L will be admitted into evidence.

9 MR. GREIM: A little housekeeping, I'm
10 sorry, Ms. Vigil.

11 Q. So you mentioned the affidavit. There are
12 obviously different parts of this request. So we'll
13 get to the affidavit. But let's look at the very top
14 box where it says, "Please indicate the purpose of
15 this request." Then it's got three boxes, okay?
16 Now, here, which box is checked?

17 A. Election-related.

18 Q. Okay. And so is it your understanding that
19 these are the three permissible purposes of use of
20 voter data?

21 A. I think that these needed to be clarified.

22 Q. Well, okay. Is governmental use an
23 appropriate purpose for voter data?

24 A. It is. I think there are two defined terms
25 in the state code.

1 Q. Okay. Campaign use, is that a permissible
2 use?

3 A. Election campaign, correct.

4 Q. Right. That's what the statute actually
5 says, isn't it?

6 A. Yes.

7 Q. Third, it says election related. Is that a
8 permissible use?

9 A. I think that that is really redundant. So
10 the code does provide us with two specific purposes,
11 and they are both going to fall under the umbrella of
12 being election related. But it specifies them in
13 indicating that the government use in particular, or
14 an election campaign.

15 Q. Okay. And so do you think there are some
16 uses that are election related that are not election
17 campaign related?

18 A. I think any of the permissible use as the
19 legislature intended, it does specify those under
20 those two uses: Government and election campaign.

21 Q. Okay. Here's my specific question to you:
22 Do you think that there are some election-related
23 uses that are not election campaign uses?

24 A. I think that we would need a little bit
25 more information to be able to understand how it's

1 going to be utilized. And, generally, it's either
2 going to be, you know, an election administrator, a
3 campaign, or somebody directly involved in the
4 election process.

5 Q. I see. So what if it's an observer of the
6 election campaign who is advocating for changes to
7 election laws? Would you say that it's not an
8 election-campaign-related use?

9 A. I think that it would need some analysis,
10 and that's why we have legal guidance. I would
11 probably seek information from our general counsel.

12 Q. Well, why was the election-related category
13 taken off the form?

14 A. Again, as I mentioned, in reviewing the
15 state code, and wanting to provide clarity to the
16 requesters, to anyone using the form, including our
17 state county clerks who would like clear, bright
18 lines, that is the purpose of our office is to
19 provide guidance where there is something that needs
20 clarity. And in doing analysis of what the
21 legislature intended, we reviewed that portion of the
22 code and updated the form accordingly, that provided
23 for the two defined specific purposes.

24 Q. Was this at the same time that you received
25 the report from Ms. -- was it Trujillo?

1 A. No, the form for Ms. Trujillo predates
2 this.

3 Q. All right. We'll return to that topic.
4 Let's move on down here. So we get down to the
5 authorization at the bottom? Now, is this the
6 affidavit that is required under the statute?

7 A. Yes.

8 Q. And so first you see there is just sort of
9 a statement under the word "authorization." And
10 we'll come back to that in a second. Then you'll see
11 it says, "I hereby swear that the requester will not
12 use, or make available to others to use, the
13 requested material for purposes other than
14 governmental election research and campaign purposes
15 under penalty of law."

16 Did I read that right?

17 A. Yes.

18 Q. Okay. Is this the language that
19 Ms. Trujillo said needed to be fixed to comply with
20 the law?

21 A. In part, yes.

22 Q. What else did she convey? This and what
23 else?

24 A. So these predate the form that was used
25 before this that was updated. Also removed the check

1 box for "research and other."

2 Q. Okay. Okay. So one of the issues she
3 raised was that another version of this form had
4 extra check boxes at the top; is that right?

5 A. Yes.

6 Q. And those check boxes also had a box for
7 research?

8 A. Yes.

9 Q. Okay. That should have been an exhibit.
10 I'm actually not seeing it.

11 A. Exhibit H.

12 Q. Is the older form, Exhibit H?

13 A. It is.

14 Q. So when was this change made?

15 A. In early 2021, January.

16 Q. Okay. So just a few months before
17 Mr. Lippert signed Exhibit B?

18 A. I don't see the date on his form. March,
19 yes.

20 Q. And so one thing that was changed is that
21 "research and other" were taken off from the top box?

22 A. Correct.

23 Q. I see that no change was made to the
24 bottom, though, to the affidavit?

25 A. Correct.

1 Q. So maybe I misunderstood. Did Ms. Trujillo
2 suggest making a change to that affidavit?

3 A. It was an oversight to not align that with
4 the top portion.

5 Q. I see. So your position, then, would be
6 that the bottom affidavit, that bottom sentence, "I
7 hereby swear" is correct, but maybe the word
8 "research" should have been taken out?

9 A. Correct.

10 Q. Okay. Otherwise, it's accurate, though?

11 A. Correct.

12 Q. So that was eventually changed, though,
13 wasn't it?

14 A. It was.

15 Q. Now, if it was accurate before, why was it
16 changed?

17 A. Again, you know, anytime we're made aware
18 of a process, a procedure, we receive feedback from
19 external customers, our partners, which are
20 stakeholders, county clerks, you know, we're going to
21 evaluate and make adjustments. We want to improve,
22 we want to modernize.

23 So based on feedback, you know, that's when
24 the adjustment was made, again, to provide clarity,
25 and to specifically align with the statute to avoid

1 confusion.

2 Q. So that change was made on February 10th;
3 correct?

4 A. Correct.

5 Q. Now, you said feedback from stakeholders
6 and all these other people. Who suggested to you
7 that the authorization needed to be changed?

8 A. It came out of a conversation mainly with
9 one of our county clerk offices. As we all have an
10 awareness, 2020, there is a lot of interest in the
11 election process. We receive inquiries into our
12 procedures and our process daily, multiple times a
13 day. And so it is always kind of a work in progress.
14 We want to improve. So this specifically came out of
15 a conversation with the Otero County Clerk.

16 Q. Okay. So this happened just in February of
17 2010. What was the reason the Otero County Clerk
18 raised? How did this come to that clerk's attention?

19 A. Sure. So they are inundated with records
20 requests at this point in that time, you know, along
21 with interest in the 2020 election. We have also
22 just experienced the need to ensure the election
23 security of our processes, both a cyber issue and a
24 physical issue. And part of that is making sure that
25 we are consistently providing correct and consistent

1 public records, but that we are protecting
2 information that needs to be protected.

3 So it is something that we provided
4 guidance to the counties on. She reached out based
5 on a forensic audit that was being approved by her
6 county commission, and she had a very long list of
7 public records. One of those items was a request for
8 voter rolls. And when she brought that to us, she
9 was using a form that was not the prescribed form.
10 So for voter data our office prescribes that form.
11 So that's when it was really an issue raised of,
12 number one, that's not the right form; and number
13 two, in reviewing our form, it can be helpful to
14 provide clarity based on the questions she's getting
15 of trying to get this information consistently.

16 Q. Is it your testimony that the authorization
17 that's in Exhibit I is consistent with New Mexico
18 law?

19 A. Yes.

20 Q. But you also claim that the authorization
21 under Exhibit A is consistent with New Mexico law?

22 A. I don't think it is an issue of not being
23 consistent with the law. I think it is important to
24 provide as much clarity as we can.

25 Q. Okay. But my question wasn't that, though.

1 My question was: Is it your testimony that the
2 authorization in Exhibit A is consistent with New
3 Mexico law?

4 A. They are both.

5 Q. We kind of beat around the bush earlier
6 about what election related means, that it can be
7 different from campaign related. Let me ask you if
8 VRF, our client here, requested data, obtained the
9 data itself; let's say you had filled one of the
10 requests. Someone had said: Hey, just fill out this
11 form. You filled out the form. And they agreed --
12 let's just say right now, they agreed they weren't
13 going to send the data to anyone else. They were
14 just simply going to analyze it, and then publish
15 this information about the discrepancy.

16 Okay. Is it the Secretary of State's view
17 that that is consistent with New Mexico law; that
18 that is an election-related use that would be
19 allowed?

20 A. The issue is not their use of obtaining the
21 data. It was really the distribution that was the
22 concern with VRF in particular. So we would have not
23 denied a request, given the scenario you described.
24 If they would have selected a relevant purpose, we
25 would have provided the data to Vote Ref directly.

1 Q. So your testimony today, you would have
2 provided the data so long as it was not shared with
3 anyone else?

4 A. It has to be utilized lawfully. And we
5 feel that putting that online for the world to access
6 is not a lawful use, and it raises security concerns.

7 Q. Okay. So my question, though, is simply
8 that the only thing -- your testimony today is that
9 the only thing that makes its use unlawful is that
10 others can see it on the internet. Is that correct?

11 THE COURT: Hold on just a second.

12 MS. SERAFIMOVA: Objection. It does call
13 for a legal conclusion in this situation;
14 particularly, she's not an attorney.

15 THE COURT: Well, but these are things that
16 the election director supervises. So if she can't
17 answer the question, she can say it. But I think
18 probably she has knowledge as to why this was
19 changed. Overruled.

20 A. So my statement was that we have not had a
21 practice of denying for a fully completed affidavit,
22 which provides the legally authorized purposes, and
23 we would have provided the data, if they had
24 completed the affidavit appropriately.

25 Q. Okay. But that wasn't my question, okay?

1 I'm just going to say it point blank: Assuming that
2 they don't share the data, is using the data, as VRF
3 has been for its discrepancy analysis, is that an
4 authorized purpose under New Mexico law in the view
5 of the Secretary of State's Office?

6 THE COURT: If you're going to have a
7 talking objection, maybe you need to come up here to
8 the bench.

9 MS. SERAFIMOVA: Yes.

10 (The following proceedings were held at the
11 bench.)

12 MS. SERAFIMOVA: So, Your Honor, again, she
13 has testified that they basically do a ministerial --
14 they look at the affidavit. If it's filled out, they
15 process it. That's the first function. That's not
16 an appropriate question, really calls for a legal
17 conclusion on a hypothetical.

18 THE COURT: Maybe. Maybe. This is
19 factual. She knows why this stuff was changed, so I
20 need to hear it. I'm going to allow the question.
21 If she can't answer it, fine. But I think that I
22 need to hear it. Why was this stuff changed?

23 MS. SERAFIMOVA: That wasn't the question.

24 THE COURT: I know it's not, but these were
25 foundational questions. So I'll let them ask it.

1 When you get to a stopping point, we need
2 to shut it down, but I don't want to stop you in the
3 middle of this.

4 (The following proceedings were held in
5 open court.)

6 THE COURT: All right. Mr. Greim.

7 BY MR. GREIM:

8 Q. I'm trying to understand how your office
9 applies the definition of election related, okay, and
10 how it compares to election campaign related. I'm
11 trying to understand that change in the document.

12 And so I'm giving you a hypothetical that
13 may not comport with how the form normally looks,
14 okay? I'm asking you to assume that you know certain
15 facts, okay?

16 So the facts I'm asking you to assume are
17 that Voter Reference Foundation is not going to share
18 the data on its website like it does today. Instead,
19 Voter Reference Foundation is going to do this data
20 analysis, and then issue a press release about a
21 discrepancy between the file and, you know, the
22 voters who actually voted. That's the use, okay?

23 So, as the agency responsible for enforcing
24 this, is it the Secretary of State's position that
25 that is an election related, or an election campaign

1 related use?

2 A. I think that there is no strict
3 prohibition. And I think it would require a
4 consultation with my legal counsel to ensure that we
5 are consistently providing the data.

6 Q. What more would you need to know?

7 A. I think that we would need to do a legal
8 analysis. I'm not an attorney.

9 Q. I'm trying to understand what about
10 election -- I'm trying to understand what activities,
11 what purposes of speech, election related encompassed
12 that are no longer allowed under the new form.

13 A. And I think we have very clear guidance on
14 two purposes that we can provide a response for a
15 requester on. I think, if it needs a legal analysis,
16 we would seek that from our general counsel.

17 Q. Okay. If you learned that someone is using
18 the data for a purpose that, in your view, does not
19 comport with this form, we've seen that you will
20 refer that person for criminal prosecution; correct?

21 A. The circumstance was not about one of those
22 two definitions. It was very clear about how that
23 information was being made public. It was a concern
24 for the voter's privacy. It was not based on any
25 analysis of using it to make some determination of

1 what's being called, incorrectly, "a discrepancy."

2 Q. I see. And so the reason that Voter
3 Reference Foundation was referred was because of a
4 concern for voter privacy?

5 A. It was the distribution of the voter data.

6 Q. And the Secretary of State's position is
7 that the requester can never, ever, ever share the
8 voter data; is that correct?

9 MS. SERAFIMOVA: Objection, Your Honor.

10 THE COURT: Overruled.

11 A. There are specific prohibitions in our
12 Election Code. And we do feel like our analysis in
13 this circumstance of publishing the information
14 online for the world is a violation of those
15 prohibitions.

16 Q. And we are here -- we're just about done --
17 we are here to understand exactly what parts of VRF's
18 conduct caused the referral. And so my question is:
19 Is it the use, or is it the sharing?

20 A. Sure. So, you know, in the authorization
21 itself, we can look through kind of those itemized
22 items, and it indicates they cannot sell, loan,
23 provide access to -- so providing access to -- or
24 otherwise surrender voter information. And they
25 cannot use it for any commercial purpose. So I would

1 point directly to, in your scenario described,
2 provide access to or otherwise surrender this
3 information.

4 Q. Now, you're looking at the newer one,
5 though, not the one that Local Labs signed; right?

6 A. I am using that as a reference, because I
7 don't have the Election Code in front of me. So it
8 is the distribution, the providing access to, the
9 duplication, and sharing of that information.

10 Q. I see. So if anyone shares -- if any
11 requester shares information, it is your position
12 that they have made a false affidavit, and they have
13 violated the law; is that correct?

14 MS. SERAFIMOVA: Objection, Your Honor.

15 THE COURT: Well, she can state her
16 position. If you want to argue something
17 different -- but I think I need to hear from the
18 witness. Overruled.

19 A. I'm sorry. Can you restate your question?

20 Q. Well, I'm just going to go to the form.
21 I'll go along with you and make this a clear
22 question, and this will be just about it, because
23 we're all turning into pumpkins and squashes here.

24 I'm on Exhibit I. So it is your position,
25 first of all, that the authorization is a guide to

1 what New Mexico law allows; correct?

2 A. Correct.

3 Q. And there are four bullet points there that
4 you've got to initial; right?

5 A. Right.

6 Q. And the very first one says, "sell, loan,
7 provide access to, or otherwise surrender
8 information"; right?

9 A. Correct.

10 Q. So it's your position that if anyone does
11 those things, regardless of why they do it, they are
12 violating New Mexico law?

13 A. Correct.

14 MR. GREIM: Okay. Your Honor, we'll stop
15 there.

16 THE COURT: All right. Do y'all want to
17 get back together and continue this? I mean --

18 MS. SERAFIMOVA: Not necessarily in person,
19 but yes.

20 THE COURT: I'll make it as easy as y'all
21 agree to do. If you disagree, then I can get back on
22 the phone and work it out with you. But I assume you
23 want to continue this hearing?

24 MR. GREIM: We'll agree one way or another.

25 THE COURT: Okay. But y'all want to get

1 back together?

2 MR. GREIM: I think we do.

3 THE COURT: Why don't y'all talk, it
4 doesn't have to be tonight, why don't you talk to
5 Ms. Rotonda about how much time you need and when you
6 want to get back together, and try to make myself
7 available.

8 MR. GREIM: I had some questions for you
9 about what you'd like for us -- you had some
10 questions, you came in with -- you know, we orally
11 responded. At the end of this process -- I don't
12 know if you do this -- but would you like proposed
13 findings?

14 THE COURT: It's totally up to y'all.
15 Y'all might talk about that. If y'all want to submit
16 proposed findings of fact and conclusions of law, you
17 can. If you want to have written closings, if you
18 want to do oral closings, if you want to do all
19 three, that's fine. Why don't y'all talk about it.
20 And if you can't agree, then I'll listen to your
21 arguments and decide. I'll probably let you say what
22 you want. So if you want to do those things, that's
23 fine with me. And if somebody doesn't want to do
24 them, they don't have to do them.

25 MR. GREIM: If I could be so bold, what

1 would be most helpful for the Court?

2 THE COURT: Well, it's always helpful to a
3 court to give proposed findings of fact and
4 conclusions of law. But I know that that's
5 expensive, time consuming, and all that, so I don't
6 force it on you. But if you want to do it, it's
7 always helpful. Is that helpful?

8 MR. GREIM: Yes.

9 MS. SERAFIMOVA: Very much, as long as we
10 have some time to do it.

11 THE COURT: Well, y'all be thinking also
12 about the time schedule. I want to be a good judge.
13 You're the plaintiff; you want a preliminary
14 injunction, I want to give it in a timely way. But I
15 would also like to think about some of this stuff.
16 So y'all kind of think about at what point do I quit
17 being a good judge, not getting you a ruling here.
18 So think about that as well.

19 Anything else we need to discuss while
20 we're together? Anything else I can do for you
21 tonight, Mr. Greim?

22 MR. GREIM: I think that's all.

23 THE COURT: How about you from the State?
24 All right. I appreciate y'all's hard work, your
25 presentations. And we'll see you shortly.

1 MR. GREIM: Just to be clear, we're not
2 finished with Ms. Vigil.

3 THE COURT: I understand. All right.
4 Y'all have a good evening. Be safe.

5 (The Court stood in recess.)
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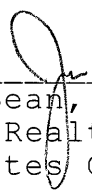
C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on May 24, 2022.



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